Supreme Court, U.S.
FILED
01 893 DEC 11 2001
OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA,

Petitioner,

v.

CITY OF NAPA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals, State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a city may condition a permit to build homes on one's property on the landowner's subsidy of "low-income" housing (either by selling or renting a specified percentage of the homes at below-market rates or by paying an in-lieu fee), where the city has failed to establish any nexus between the construction of market-rate housing and an increased shortage of low-income housing.

2. Must a property owner request a waiver from a regulation that is unconstitutional in every application before he can present a claim that is ripe for judicial review?

3. Is the Due Process Clause of the Fifth Amendment to the United States Constitution violated when apartment owners are required to rent certain units in perpetuity at rates tied to the median income of a city's residents without any consideration of actual costs?

LIST OF ALL PARTIES

Petitioner: Home Builders Association of Northern California.

Respondents: City of Napa, California.

Intervenors and Respondents: Napa Valley Community Housing, a California nonprofit corporation; Non-Profit Housing Association of Northern California, an unincorporated association; Housing California, a California nonprofit corporation; Patricia Domingo; Heather Clayton; Donna Simon; Hilda Avina; Rainy Stegall; and Hector Candelario.

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PETITION FOR WRIT OF CERTIORARI

Home Builders Association of Northern California (Home Builders) respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal.

OPINIONS BELOW

The final opinion of the California Court of Appeal, as modified by the court, is reported in part at 90 Cal. App. 4th 188 (2001), and is reproduced as Appendix A to this petition. The original opinion, now withdrawn, was reported at 89 Cal. App. 4th 897 (2001), and is not reproduced in the appendix. The unreported order of modification to the original opinion is reproduced as Appendix D. The Court of Appeal's unreported denial of a petition for rehearing is reproduced as Appendix C. The California Supreme Court's unreported denial of review is reproduced as Appendix B. Finally, the Judgment of the Superior Court is unreported and is reproduced as Appendix E.

JURISDICTION

The original opinion of the California Court of Appeal was filed on June 6, 2001. This opinion was amended on July 2, 2001. The order of the California Supreme Court denying Home Builders' Petition for Review was filed September 12, 2001. This petition is timely under Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution states in relevant part, "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution states in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The City of Napa's Ordinance O1999/19, entitled, "An Urgency Ordinance of the City of Napa, County of Napa, State of California, Adding Chapter 15.94 to the Napa Municipal Code Creating and Establishing a Housing Trust Fund, A Housing Impact Fee on Non-Residential Development and Establishing an Inclusionary In-Lieu Fee Requirement for Residential Development Projects," is set out in Appendix F to this petition.

The City of Napa's Ordinance O1999/20, entitled, "An Ordinance of the City of Napa, County of Napa, State of California, Adding Chapter 15.94 to the Napa Municipal Code Creating and Establishing a Housing Trust Fund, A Housing Impact Fee on Non-Residential Development and Establishing an Inclusionary In-Lieu Fee Requirement for Residential Development Projects," is the permanent version of City of Napa Ordinance O1999/19. It is reproduced in Appendix G.

The City of Napa's Resolution R1999/161, entitled, "Resolution of the City Council of the City of Napa, State of California, Setting the Housing Impact Fee and Housing In-Lieu Fee for Developments Within the City of Napa," is reproduced as Appendix H to this petition.

Chapter 17.84 of the City of Napa Municipal Code, entitled, "Affordable Housing" is reproduced as Appendix I.

STATEMENT OF THE CASE

A. Factual Background–The Disputed Ordinances and Resolution

After years of growth-retarding zoning laws characterized by expansive set-asides for open space and agriculture, urban-limit lines, and large lot subdivisions, the City of Napa (City) concluded that there was not enough housing for lower income residents. In 1999, the City adopted a so-called "inclusionary zoning"[1] law that places the burden of constructing and paying for low-income housing on the developers (and thus ultimately on the purchasers or renters) of new homes.[2] As shown below, under the City's ordinance, for every nine new homes or apartments that a property owner obtains approval to build, he or she must construct an additional unit of like quality and appearance and sell or rent that unit at a below-market rate price to a lower income household. Municipal Code §§ 15.94.050(A) & (I), App. at G-29 to G-30, G-36 to G-37. If the unit is not sold by the time a certificate of occupancy is issued, it must be sold to the City at the artificially low price. Municipal Code § 15.94.050(F)(1)(d), App. at G-34. In some cases, a property owner may arrange to provide an alternative exaction or pay an in-lieu fee. Municipal Code §§ 15.94.050(B)-(E), App. at G-30 to G-32, and Resolution R1999/161, App. H. Violation of the

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[1] The term "inclusionary zoning" refers here not to zoning laws that reserve land for higher density or lower income housing, or that undo exclusionary laws, but to laws that force developers of market rate housing to subsidize housing for lower income renters and buyers.

[2] The law consists of City of Napa Ordinances O1999/19 and O1999/20, which add City of Napa Municipal Code § 15.94, and City of Napa Resolution O1999/161. Because the code in O1999/19 is only temporary and nearly identical to the new code found in the permanent Ordinance O1999/20, appendix references in this petition to Municipal Code § 15.94 will be made only to the final version found in Ordinance O1999/20, as reproduced in Appendix G.

ordinance is a "public nuisance" and criminal misdemeanor offense. Municipal Code § 15.94.060, App. at G-39. In effect, the inclusionary zoning ordinance conscripts residential developers and, under threat of criminal sanction, requires them to dedicate land, material, time, or capital to construct and sell low-income housing.

The inclusionary zoning law allows property owners to choose their poison from among three alternatives. Municipal Code §§ 15.94.050(A) to (C), App. at G-29 to G-32. Alternative number one requires property owners building residential housing to provide a substantial in-kind subsidy to low-income individuals, requiring that homes be rented or sold at subsidized prices and only to persons falling within specified income categories. Municipal Code § 15.94.050(A), App. at G-29 to G-30. With respect to rental units, the challenged ordinances require property owners who develop rental housing to rent 10% of their units at rates that are based entirely upon certain fixed percentages of the income levels of lower and very low-income households and are unrelated to any measure of actual costs. Municipal Code §§ 15.94.020(B)-(C) and § 15.94.050(G), App. at G-11 to G-12, G-35. Specifically, one-half of the subsidized units, or 5% of the total, must be rented to low-income residents at a rate that is no more than 30% of 80% of the median income in Napa. *Id.* The remaining 5% must be rented to very low-income individuals at a rate no greater than 30% of 50% of the median income. *Id.* There is no mechanism available to adjust these rents upward, ever, in the event that the owner must make significant capital improvements or if unanticipated expenses are incurred. In other words, there is no mechanism to ensure that rents can be adjusted to ensure a fair rate of return. These affordability provisions must be guaranteed in "perpetuity." Municipal Code § 15.94.050(J), App. at G-37 to G-38.

For units that are sold rather than rented, Section 15.94.020(C) of the Napa Municipal Code defines in part

"Affordable sales price" to be "affordable only if each monthly owner-occupied housing payment is equal to or less than one-twelfth of 30% of income for the specified target income household." App. at G-11. Low-income buyers have an income that does not exceed 100% of the median income. Municipal Code § 15.94.050(H), App. at G-35. Ten percent of all homes must be sold at these artificially low prices.

Alternative number two is explained by Municipal Code § 15.94.050(B) and it allows an "Alternative Equivalent Proposal" wherein a property owner may propose such actions as the "dedication of vacant land, the construction of affordable units on another site or acquisition and enforcement of required rental/sales price restrictions on existing standard dwelling units." App. at G-30. The City Council has the complete discretion to approve or disapprove the proposed alternative. Municipal Code § 15.94.050(B), App. at G-30.

The third alternative allows the property owner to pay an "in-lieu housing fee." Under this proposal, the property owner would pay the fee set out in City of Napa Resolution No. R1999/161. App. at H-3 to H-4. A developer of residential housing for sale may choose to pay the fee, while developers of multifamily units must obtain permission of the City Council. Municipal Code § 15.94.050(C), App. at G-30 to G-32. For units with construction costs between $86,700 and $115,250, the fee is 1%. For units over $115,250, the fee is 2%. Resolution R1999/161(2)(B)-(2)(C), App. at H-4. For example, a project of 100 homes of 2500 square feet and an average Uniform Building Code valuation of $226,500 would result in a fee of $4,530 per market rate unit.

There are no "density bonuses" or other economic incentives available for landowners who meet the basic requirements set out above. For landowners who *exceed* these requirements, incentives are available. *Compare* Ordinance No.

O1999/20, Municipal Code § 15.94.050(F)(2), App. at G-34, *with* Municipal Code ch. 17.84, App. I.

Because the subsidized units for sale or rent must "be comparable in number of bedrooms, exterior appearance and overall quality of construction to market rate units in the same residential project," the owner has very limited flexibility in developing less expensive units to sell or rent at the mandated below-market price to lower- and very low-income persons. Municipal Code § 15.94.050(I), App. at G-36.

Prior to adopting the inclusionary zoning law, the City neither developed nor cited *any* evidence demonstrating that the construction of new residential housing causes or in any way contributes to the City's need for low-income housing. The City did not prepare any studies that demonstrate that families moving into new homes and apartments displace land or housing that would otherwise be occupied by lower income persons. In fact, as alleged in Home Builders' complaint, in every single application to develop residential development approved prior to the adoption of the challenged law, the City expressly found that there would be no adverse impact on affordable housing needs.[3] Nor did the City prepare any evidence that forcing builders to subsidize low-income housing would alleviate the alleged housing shortage. However, seeking to finance a worthy social program without inconveniencing the taxpayers of Napa, the City found the developers of new housing to be too tempting of a target to ignore and therefore singled them out to bear the burden.

B. The Proceedings Below

On September 17, 1999, shortly after the inclusionary zoning law was adopted, Home Builders filed suit. Home Builders alleged, among other things, that the law violated the Takings and Due Process Clauses of the United States

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[3] Complaint ¶ 22, found in the Joint Appendix below at 8.

Constitution. The City demurred to the complaint and intervenors joined the demurrer. The trial court sustained, without leave to amend, *see* App. E, and Home Builders appealed. The court of appeal affirmed. *See* App. A.

1. The Takings Clause Challenge

In its takings claim, Home Builders contended (1) that permit conditions that impose exactions of land or money upon residential development must be reviewed under the "heightened scrutiny" and "essential nexus" standards of *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.3, 836-37 (1987), and (2) that *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), requires a City to demonstrate that the exaction is "roughly proportional" to the development's impacts. The court rejected Home Builders' Takings Claim on three independent grounds.

First, in considering whether the "ordinance is invalid under *Nollan* and *Dolan* because there is no 'essential nexus' or 'rough proportionality' between the exaction required by the ordinance, and the impacts caused by development of property," the court found that "*Nollan* and *Dolan* are inapplicable" because in the court's view the ordinance imposes exactions that are "generally applicable through legislative action" because it applies to all home builders. Therefore the "essential nexus" standard of *Nollan* and the "rough proportionality" standard of *Dolan* do not apply. App. at A-9.

Furthermore, the court found, that because the zoning law is a "generally applicable legislative enactment rather than an individualized assessment imposed as a condition of development, the burden shifting standard described in *Dolan* does not apply." App. at A-7. In other words, the City has no burden to demonstrate that there is a nexus or rough proportionality between building homes and a need to subsidize low-income housing.

Second, while not addressing whether there was any nexus between the development of new homes and a need for subsidized low-income housing, the court below assumed that "it is beyond question that City's inclusionary zoning ordinance will 'substantially advance' the important governmental interest of providing affordable housing" because it "will necessarily increase the supply of affordable housing." App. at A-8. The court did not consider the legitimacy of advancing a state interest through the imposition of a disproportionate cost on a small segment of society.

Third and finally, the court of appeal also concluded that because the "City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking." App. at A-6. In other words, because the City has the option of waiving an ordinance which is alleged to be always unconstitutional, there is no ripe constitutional violation.

2. The Due Process Clause Challenge

Home Builders also brought a due process challenge to the requirement that they or the future owners of rental housing constructed under this ordinance provide subsidized rental housing for eternity without any hope of ever receiving a cost-based adjustment. The court rejected this allegation on several grounds. First, it found that developers of multifamily housing did not have a right to a "fair return," explaining that "we are not aware of, any case that holds a housing developer is entitled to 'fair return' on his or her investment." App. at A-13. That, however, did not answer the question of whether government may impose a permanent confiscatory rate regulation without any opportunity for adjustment. Second, the court concluded that because a developer could ask the city for permission to pay the city not to impose the rental requirement (through an in-lieu fee or some other undefined alternative), that there was actually no requirement that units be rented at below-market

rates. App. at A-13 (ordinance does not require subsidized rentals because the developer "may choose one of the alternatives, such as donating vacant land or paying an in-lieu fee"). Finally, it held that the City can waive a developer's obligations to set aside units for low-income rentals at the outset, if the developer can prove to the City Council a lack of a "reasonable relationship or nexus" between the development and the exaction a facial due process challenge must fail. App. at A-13 to A-14 (the "city officials [can] reduce, modify or waive the requirements"). The court did not address whether there has been a violation of the due process rights of those developers and their successors who do not qualify for the waiver at the outset and who must rent, in perpetuity, units to low-income households with no hope of ever adjusting the rents above the median income formula found in the ordinance.

On September 12, 2001, the California Supreme Court denied review. *See* App. B.

REASONS FOR GRANTING THE WRIT

On two important questions of takings law and procedure, and on a significant issue of federal due process law, the court below issued a decision that is in conflict with the decisions of this Court, as well as the lower courts, both state and federal. All of these conflicts warrant resolution by this Court.

I

ONLY THIS COURT CAN RESOLVE THE SERIOUS CONFLICTS IN THE STATE AND LOWER FEDERAL COURTS OVER WHETHER LEGISLATIVELY ADOPTED EXACTIONS IMPOSED ON THE DEVELOPMENT OF LAND ARE IMMUNE FROM SEARCHING REVIEW

It should be plain that government cannot condition the exercise of the right to put property to economically beneficial

use upon the forced payment of land, money, or labor when those exactions are not closely related to impacts caused by the use of the underlying property.[4] Thus in *Nollan* this Court held that when government could legitimately exercise its police power and deny a permit, it may instead impose a condition on the approval–but only if that condition has a nexus to and serves to ameliorate the public harm that could have justified the permit denial. 483 U.S. at 835-37. In *Dolan* this Court refined this analysis by explaining, first, that there must be some "rough proportionality" between an exaction and the adverse impact caused by the use of the underlying property and, second, that the government imposing the exaction had the burden to justify that exaction. 512 U.S. at 391 & n.8, respectively. The requirement that such exactions be subject to this "heightened scrutiny" is perfectly sensible and insulates landowners from overreaching governmental entities that might otherwise take unfair advantage of persons during the

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[4] Labor, is of course, a form of property fully protected by the Constitution. As James Madison stated:

> [Man] has an equal *property in the free use of his faculties* and free choice of the objects on which to employ them. . . .
>
> . . . .
>
> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which indirectly violates their property, in their actual possessions, *in the labor that acquires their daily subsistence*, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.

James Madison, *A Property in Our Rights*, National Gazette, Mar. 27, 1792 (emphasis added).

application process. Unfortunately, it is a requirement that some states, including California, are resisting with great vigor. Even after this Court's examination of regulatory exactions in *Nollan* and *Dolan*, the state and lower federal courts remain in serious disarray in determining how (or even whether) to measure these sort of conditions against the Takings Clause.

A. All Ordinances That Exact Land, Money, or Labor as a Prerequisite to the Exercise of the Right to Use Property Must Be Subject to Heightened Scrutiny

1. A Holding That Immunizes Legislative Acts from Heightened Scrutiny Is in Conflict with the Precedents of This Court

The court below suggests that the Napa land use exactions can evade the searching judicial inquiry required by *Nollan* and *Dolan* because there is a *legislative* enactment that applies to a class of property owners such as developers. App. at A-9 to A-10 (excluding searching review of ordinance because it is "generally applicable through legislative action"). However, it is clear that this holding conflicts with the facts and intent of *Nollan*, *Dolan*, and *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

While this Court noted in *Dolan*, 512 U.S. at 385, that a standard of deference is applied to "essentially legislative determinations classifying entire areas of the city" it was specifically referring to the sort of zoning regime described in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), where land ***use*** regulations are applied on a generally applicable geographical or similar basis. This Court was not exempting from heightened review a requirement, targeted ***only*** at those landowners engaged in residential home building, that a landowner perform a task or pay a fee as a prerequisite to using his or her land. Indeed, the ordinance here is no more "generally applicable through legislative action" then were the

challenged laws in *Nollan* and *Dolan*. In *Nollan*, this Court noted the Coastal Commission's "public announcement" (and thus uniform application) of its exaction policy, 483 U.S. at 833 n.2, in response to Justice Brennan's dissent that found it significant that "[t]he Coastal Commission Interpretative Guidelines make clear that fulfillment of the Commission's constitutional and statutory duty requires that approval of new coastline development be conditioned upon provisions ensuring lateral public access to the ocean," *Nollan*, 483 U.S. at 857-58 (Brennan, J., dissenting). In other words, just as in the present case, the disputed exaction requirement was broadly applicable through legislative enactment.

Likewise, the statutory requirement in *Dolan* that landowners contribute to transportation infrastructure was also generally applicable and adopted through legislative action. *Dolan*, 512 U.S. at 378 (noting that the Community Development Code "requires that new development facilitate this plan by dedicating land for pedestrian pathways"). In short, the lower court's crafting in *Napa* of a distinction for generally applicable legislatively adopted conditions is in marked conflict to the history and examples in *Nollan* and *Dolan*.[5]

2. Legal Scholars Suggest That Legislative Enactments Requiring Exactions Deserve Heightened Scrutiny; Others Have Observed Widespread Conflict in the State and Federal Courts

Legal scholars have opined that legislative enactments restricting property rights deserve heightened scrutiny. For example, Professor Kmiec suggests that heightened scrutiny is appropriate for legislative enactments imposing public burdens

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[5] Two members of this Court have also expressly questioned the wisdom of treating legislative enactments to special deference in *Parking Association of Georgia v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., dissenting from denial of certiorari).

on specific private uses. Douglas W. Kmiec, *The "Substantial Advance" Quandary: How Closely Should Courts Examine the Regulatory Means and Ends of Legislative Applications?*, 22 Zoning & Plan. L. Rep. 97, 102-04 (1999). Other scholars have noted the conflicts that exist among the lower federal and state courts, with some courts treating exactions very differently according to whether they are legislatively adopted or not, and whether they are fees or some other form of exaction. *See, e.g.*, James E. Holloway & Donald C. Guy, *A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities*, 9 Dick. J. Envtl. L. & Pol'y 1, 8 n.12 (2000); Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 Harv. J.L. & Pub. Pol'y 233, 283 (1999) ("Even in the states, where a unified interpretation [of *Nollan*] might be expected to center around a leading state supreme court case, there are often multiple contradictory decisions; at the level of federal circuits, this inconsistency becomes chronic.").

3. Many State Courts and a Lower Federal Court Require Heightened Scrutiny for Legislatively Enacted Exaction Requirements

The holdings of several states and the First Circuit confirm that generally applicable legislative enactments are subject to the standards established in *Nollan* and *Dolan*.

New York: Before *Dolan* was decided, but after *Nollan*, the New York Court of Appeals struck down a permit fee imposed on owners of single room occupancy hotels who wished to change the use of their property in *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989). The fee was designed to subsidize the City's low-income housing program and had been imposed by legislation and, as such, was uniformly applied. 542 N.E.2d at 1061-62. The court focused

on the lack of a nexus between the complex problem of low-income housing in New York City and the landowners' use of their property for other purposes, *id.* at 1069, stating that "[s]uch a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem." The same court also struck down legislatively enacted rent control ordinances as being violative of the Takings Clause in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 487 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995). That decision relied upon *Nollan* and *Dolan*. These holdings are in marked contrast to the decision below which refused to analyze with any degree of serious scrutiny a legislatively enacted land use permit exaction requirement.

Ohio: In *Home Builders Association of Dayton v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000), the Supreme Court of Ohio, citing to *Dolan*, applied a "middle level of scrutiny" to legislatively adopted transportation impact fees imposed on subdivision approvals. The court reasoned that a test that looks at both the need for the transportation project and the fairness of imposing the cost on developers is a test that will

> adequately balance the interests of local governments with those of property owners. The first prong of the test decides whether the ordinance is an appropriate method to address the city's stated interests, and the second prong assures that the city and developers are paying their proportionate share of the cost of new construction.

Id. The court upheld the fees in that case after noting that the trial court "reviewed volumes of evidence" and made the requisite factual findings regarding the necessity for the road projects and the impacts to be caused by subdivision development. *Id.* at 358. No such analysis, however, was performed by the City of Napa or any court below. In fact,

there is no evidence in the record showing any relationship between the building of market-rate homes and an increased need for low-income housing.

Oregon: Citing to state Supreme Court precedent, the Oregon Court of Appeals has held in *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360, 365 (Or. Ct. App. 1994), that " 'the character of the [condition] remains the type that is subject to the analysis in Dolan' whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters." (Citation omitted.) (Quoting *Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. 1994).) The decision below, in contrast, focused not on the conditions imposed but upon the manner of enactment.

Washington: In *Sparks v. Douglas County*, 904 P.2d 738, 746 (Wash. 1995), the Washington Supreme Court applied *Dolan* to a legislatively adopted road dedication exaction. It upheld the exaction because there was evidence showing that the exaction was roughly proportional to the impacts of development. In *Trimen Development Co. v. King County*, 877 P.2d 187 (Wash. 1994), a developer had been given the choice of dedicating or reserving land for open space or paying a fee in lieu of such dedication. The court properly recognized the applicability of the *Dolan* test to these legislatively imposed fees. 877 P.2d at 194. The fees were upheld, incidentally, as the court found evidence to support the conclusion that the fees were "reasonably necessary as a direct result of Trimen's proposed development." *Id.* In the California decision below, of course, there was no examination of evidence, or even any opportunity to introduce evidence that would have demonstrated that the construction of market rate housing in no way contributes to a shortage of low-income housing.

Illinois: The Illinois Supreme Court in *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 390 (Ill. 1995), applied *Dolan* to a legislatively

enacted transportation district and impact fee enabling act. (The Court then proceeded to apply its even more exacting "specifically and uniquely attributable" rule in striking down part of the statute.) Similarly, an Illinois appellate court agreed in *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. Ct. 1995), *cert. denied*, 519 U.S. 976 (1996), that

> [a]lthough not binding as precedent, we find Justice Thomas' comments [in *Parking Association of Georgia*] particularly persuasive and consonant with the rationale underlying *Dolan* and similar cases. Certainly, a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property.

Id. at 390. Such "insulation" is precisely what has occurred in the City of Napa.

First Circuit: The First Circuit has also articulated the law in a way contrary to the court below. In *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), the court reviewed a low-income housing fee that had been imposed when the owner of the site of some low-income apartments sought permission to replace the apartments with new condominiums. *Id.* at 13. While the challenge to the fee was saddled with a statute of limitations problem, the court noted that the facts were undisputed that "no rational nexus existed between the amount of the Developers' . . . [fee] and any burden imposed on the City due to the zoning change." *Id.* at 14. If not for a statute of limitations problem, the court would have struck down the fee. Again, the contrast between this case and the Napa decision below is remarkable. The First Circuit and all the courts listed above were willing to examine carefully the stated justifications

for land use regulations that were legislatively enacted.[6] The court of appeal below was not.

4. However, There Are Also Several States That Are in Marked Conflict with the Analysis of the Majority of States

While many state and lower federal courts understand that the proper role of the judiciary is to review carefully attempts to exact real property or labor, with the initial burden of proof to be carried by government, there are a significant number of state courts that do not understand this.

New Jersey: The New Jersey Supreme Court has been particularly aggressive, not only in upholding inclusionary-zoning ordinances, but in actually mandating them. In *Holmdel Builders Association v. Township of Holmdel*, 583 A.2d 277 (N.J. 1990), the New Jersey Supreme Court considered whether various municipal inclusionary zoning ordinances that required the payment of low-income housing fees were constitutional. With respect to a challenge under the Takings Clause, the court merely observed that "[a]s long as the measures promulgated are not confiscatory and do not result in an inadequate return of investment, there would be no constitutional injury." *Id.* at 293. The court noted that it had earlier held in *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390 (N.J. 1983) (*Mt. Laurel II*), that "municipalities [must] use affirmative inclusionary-zoning measures, including mandatory set-asides, to redress affordable-housing needs." *Holmdel Builders*, 583 A.2d at 294 (citing *Mt. Laurel II*, 456 A.2d at 436). Interestingly, the court in *Mt. Laurel II* barely addressed a Takings Clause argument, dismissing with a single sentence that "mandatory set-asides keyed to the construction of lower

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[6] Similarly, the Virginia Supreme Court found a legislatively enacted inclusionary zoning law to violate the Virginia constitution's Takings Clause in *Board of Supervisors of Fairfax County v. DeGroof Enterprises*, 198 S.E.2d 600, 602 (Va. 1971).

income housing, are constitutional and within the zoning power of a municipality." 456 A.2d at 448. In *Holmdel Builders* the court ultimately concluded that "a residential developer could be required to set aside a percentage of units to be used for low- and moderate-income housing." 583 A.2d at 294. Since development fees perform an "identical function" they are permissible. *Holmdel Builders*, 583 A.2d at 294. The difficulty with the court's analysis is that it completely ignores the "substantially advance" test of *Agins*, the nexus requirement of *Nollan*, and the rough proportionality standard of *Dolan*.[7]

North Dakota: In determining whether a drainage requirement could be applied to property of Burlington-Northern Railroad in light of *Dolan*, the Supreme Court of North Dakota held that it could because the duty "in this case arises not from a municipal 'adjudicative decision to condition,' but rather from an express and general legislated duty under a

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[7] Indeed, a few courts have even found that development fees are not subject to *Nolan*'s nexus test or *Dolan*'s rough proportionality standard. *See, e.g., McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995). This is not only in conflict with the holdings from some of the states described in Part I(A)(3), *supra*, it is even in conflict with California. *See Ehrlich v. City of Culver City*, 911 P.2d 429, 450 (Cal.), *cert. denied*, 519 U.S. 929 (1996) (finding that *Dolan* applies at least to individually applied fees). Furthermore, many of the state cases relied upon by the *Dolan* majority in formulating its "roughly proportional" test involved fees. As noted by Justice Stevens:

> All but one of the cases involve challenges to provisions . . . requiring developers to dedicate either a percentage of the entire parcel . . . or an equivalent value in cash . . . to help finance the construction of . . . parks, and playgrounds. In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment.

Dolan, 512 U.S. at 400 (Stevens, J., dissenting).

constitutional reservation of police power over a corporation." *Southeast Cass Water Resource District v. Burlington Northern Railroad Company*, 527 N.W.2d 884, 896 (N.D. 1995).

Minnesota: In *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. Ct. App. 1996), *review denied*, No. CO-96-157, 1996 Minn. LEXIS 795, a Minnesota appellate court upheld the imposition of a tenant-relocation fee imposed on owners of mobile home parks in exchange for permission to go out of the mobile home park business. The appellate court rejected application of *Dolan* to tenant relocation fees because the fee was legislatively imposed. It found that "[o]nce legitimate governmental interests are identified, courts simply require a nexus between the local legislation and the legitimate governmental purposes." 552 N.W.2d at 287. Furthermore, "Because this case involves a challenge to a citywide, legislative land-use regulation, *Dolan*'s 'rough proportionality' test does not apply." *Id.* at 286.

Arizona: In *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997), the Arizona Supreme Court upheld the city's resource development fee that was imposed on land owners in order to build a new water supply infrastructure. The court found that *Dolan* did not affect the legality of the fee at issue and refused to apply heightened scrutiny because the fee was "legislatively" imposed: "Because the Scottsdale case involves a generally applicable *legislative* decision by the city, the court of appeals thought *Dolan* did not apply. We agree, *though the question has not been settled by the Supreme Court*." 930 P.2d at 1000 (emphasis added). It is time that this Court settles this issue in order to resolve the dramatic conflict in the state and lower federal courts.

B. The Court Below Also Erred in Concluding That Merely Because the Ordinance "Will Necessarily Increase the Supply of Affordable Housing" It Is Necessarily Constitutional

Another separate justification provided by the court below for its holding was its conclusory finding, provided without any reference to the (non-existent) evidentiary record, that it is "beyond question that City's inclusionary zoning ordinance will 'substantially advance' the important governmental interest of providing affordable housing" because it "will necessarily increase the supply of affordable housing." App. at A-8. Even if this assumption is correct,[8] it is an answer to the wrong question. The proper inquiry is not whether forcing the builders and buyers of new homes to subsidize low-income housing actually creates low-income housing; it is whether it is proper to impose this duty upon the builders and buyers in the first place. To the extent that the nexus requirement of *Nollan* or the rough proportionality standard of *Dolan*, or even the more fundamental "substantially advance" test of *Agins* applies, it is incumbent upon the courts to determine not only whether the exaction happens to serve some public purpose, but also whether it is appropriate to impose the cost of furthering that public purpose upon landowners who happen to require permits to utilize their property. This is the question properly answered by those authorities discussed above in Part I(A)(3), *supra*. For example, there was no question that the New York City

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[8] There is some evidence that inclusionary zoning development fees do little to actually produce low-income housing. *See, e.g.*, Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 Hofstra L. Rev. 539, 553 n.72 (1995) ("[S]ome of these programs have collected a substantial amount of fees and have yet to produce a single housing unit."). It is also arguable that the disincentive to building any new housing created by this ordinance may exacerbate, rather than alleviate, any shortage of affordable housing that may exist.

ordinance in *Seawall* might contribute to low-income housing, no question that the law in *Sparks* would finance roads in the State of Washington, and no question that transportation infrastructure would result from the law in *Northern Illinois Homebuilders Association*. Yet, the laws were subjected to heightened scrutiny review in every one of these cases and struck down in some of these cases because they violated the Takings Clause. These cases are in marked conflict with the rationale of the opinion below.

II

A FACIAL REGULATORY TAKINGS CLAIM IS NOT MADE UNRIPE MERELY BECAUSE A LITIGANT CAN APPLY FOR A WAIVER BASED UPON AN ORDINANCE'S AS APPLIED UNCONSTITUTIONALITY

Under the City's inclusionary zoning ordinance, if a property owner can prove to the *city council's* satisfaction that application of the ordinance will not meet the constitutionally mandated requirement of a "reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement," then the City has the discretion to waive or modify the application of the ordinance. Ordinance No. O1999/20, Municipal Code § 15.94.080, App. at G-40. In other words, if a property owner can convince the City that its ordinance is unconstitutional, the City may choose not to apply the ordinance to that property owner.

The court below found that "[s]ince City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking." App. at A-6. The meaning behind this holding is simply that so long as this waiver mechanism is in place, no facial regulatory taking claim can ever be ripe. Thus, the Takings Clause challenge will be unripe even when Petitioner argues, as it does

here, that the ordinance will always be unconstitutional in every conceivable application. But may a state's legal landscape be littered with unconstitutional local and state laws merely because they contain "waiver" provisions?

Suppose a city adopts an ordinance making it unlawful for any person not a resident of the city to bid on public works contracts. Suppose further that the ordinance contains the following waiver provision:

> Any nonresident seeking to bid on a city contract may appeal to the city council for a waiver of the residency requirement based upon a showing that the requirement is not narrowly tailored to advance a compelling governmental interest and violates the Equal Protection Clause.

Or suppose that a county passes an ordinance making it unlawful for persons of a certain race to bid on public works contracts—unless a potential bidder proves in a hearing that the racial classification did not satisfy strict scrutiny? Or, suppose a rent control ordinance required the hearing officer to consider the race of a tenant, but that he could waive that consideration if he thought it were unlawful? *See Pennell v. City of San Jose*, 485 U.S. 1, 16 (1988) (Scalia, J., dissenting in part).

Each of these hypothetical waiver provisions is identical in operation to the waiver provision at issue in this case. Each provides for a waiver of the ordinance's substantive requirement if the regulated person demonstrates that the requirement violates the relevant test for determining its constitutionality. In no instance, however, should the existence of the waiver provision immunize the ordinance from facial challenge. To prevail against a facial challenge, the government must be able to demonstrate that an ordinance can be applied constitutionally. Contrary to the court of appeal's characterization, an ordinance is not applied constitutionally when it is waived.

Home Builders alleges that there are *no* circumstances where the ordinance can be lawfully applied because the construction of residential housing in no way exacerbates any shortage in low-income housing.[9] Home Builders have further alleged that its members own real property within the City of Napa that is being adversely impacted by the ordinance.[10] Nevertheless, landowners must, in each and every case, petition the City for an opportunity to prove that the unconstitutional ordinance will be applied unconstitutionally.[11] For the purposes of a demurrer, an allegation that an ordinance will always be unconstitutional because there are no facts that can support its application cannot be saved by a waiver provision, any more than a waiver provision can save an ordinance that infringes upon the right to speech, equal protection, or any other freedom protected by the Constitution.

The notion that landowners must first apply for a waiver to the ordinance before they may bring a facial challenge is contrary to the ripeness doctrines as enunciated by this Court and several lower federal courts.

In *Village of Euclid*, for example, this Court wrote:

> [T]he attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence

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[9] *See, e.g.*, Complaint ¶¶ 22, 24-31, found in the Joint Appendix of the record below at 8-10.

[10] *See, e.g.*, Complaint ¶ 2, found in the Joint Appendix below at 2.

[11] A further problem with the scheme here is that *Dolan* expressly laid the burden of proof on the City to prove that an exaction placed upon the development of property meets the "roughly proportional" standard. 512 U.S. at 391 n.8. A requirement that a landowner must prove the lack of a "reasonable relationship" not only applies the wrong standard but it turns the burden of proof on its head.

> and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances . . . jurisdiction is clear.

272 U.S. at 386.

This reasoning was followed in *Beacon Hill Farm Associates II Limited Partnership v. Loudoun County Board of Supervisors*, 875 F.2d 1081 (4th Cir. 1989), where the Fourth Circuit discussed the ripeness holding of *Village of Euclid v. Ambler Realty*, noting:

> The court distinguished between an attack based on a specific injury in the process of actual application of the ordinance and an attack based on "the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury." . . . [272] U.S. at 395. The latter, the facial attack, is quite permissible regardless of whether the landowner has applied for or received a final determination of the extent to which the ordinance would affect his land use.

875 F.2d at 1083. In fact, as noted by the court in *Beacon Hill*, this Court has frequently entertained ***facial*** challenges to land use regulations, without requiring the litigant to apply for a permit or waiver. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981). Thus the *Beacon Hill* court concluded:

> In view of the fact that a facial challenge to a land use ordinance must carry such a heavy burden of persuasion that it may even seem that the claim of facial invalidity is entirely without merit, the

> question should nevertheless be decided for the claim is not premature merely because it is brought before a final determination of the extent of the ordinance's application to a specific piece of property after application for the proper permits has been made.

875 F.2d at 1085 (footnote omitted). This holding is clearly in conflict with the decision below that refused to entertain a facial challenge to a land use regulation which petitioners assert is unconstitutional in every conceivable application.

This Court has entertained facial attacks based on the alleged unconstitutionality of a statute in more contexts than just violations of the Takings or Due Process Clauses. For example, in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132 (1992), this Court allowed a First Amendment challenge to a parade permit fee requirement to proceed, despite the availability of such permits, because of the unfettered discretion possessed by county officials to set the amount of the fee. A similar holding had been reached earlier in *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497-98 (1982). In this case, the City Council's determination of whether a waiver is available is based upon its determination of whether there is a "reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement," Municipal Code § 15.94.080(A), App. at G-40, carries with it the sort of discretion that ought to allow for an immediate facial challenge in a court. In short, the dismissal of the facial claim based on the existence of a discretionary waiver provision is in conflict with the jurisprudence of this Court and the Fourth Circuit.

III

THE CONSTITUTION IS VIOLATED WHEN AN OWNER MUST RENT PROPERTY IN PERPETUITY AT A PRICE DETERMINED BY A ROTE FORMULA THAT BEARS NO RELATIONSHIP TO COSTS, ECONOMICS, OR UNANTICIPATED CAPITAL EXPENDITURES

Price control regulation violates the Due Process Clause, the Takings Clause, or both, if it provides no mechanism for adjusting the price in order to ensure that the regulated business receives a "fair return." This Court summarized the current state of the law of rate regulation in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), where it wrote:

> The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896) (A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense"); *FPC v. Texaco Inc.*, 417 U.S. 380, 391-392 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level"). If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation

> and so violated the Fifth and Fourteenth Amendments.

488 U.S. at 307-08.

The court below, however, found these considerations were not germane because "we are not aware of, any case that holds a housing developer is entitled to 'fair return' on his or her investment." App. at A-13. Furthermore, the court found the waiver to be dispositive "[s]ince City has the authority to completely waive a developer's obligations." *Id.* at A-14.

Unfortunately, the court below misconstrued both the nature of the Home Builders' complaint and the role of the waiver provision. It has allowed a scheme to proceed that denies landlords the right to receive a fair return on rental property and which conflicts with decisions of this Court.

The problem with the scheme here is not that the developers of residential rental units may or may not receive a fair return on their *development and construction* costs. The problem is that the ultimate owner of those rental units, at any time between now and the end of time (perpetuity), will have no opportunity to seek rent increases that are tied to anything other than the median income of Napa residents.

There is no mechanism at all for adjusting rents in accordance with changing economic circumstances, such as unanticipated capital expenditures, repair costs, or the inflation of labor and maintenance costs that are not matched by changes in Napa's median income. Any of these changes in costs or economic circumstances can quickly destroy a landlord's ability to obtain a fair return on an investment in rental property. Because the rent restrictions imposed by this ordinance are required to be in place "in perpetuity," it is highly probable that some event or events will occur between now and the end of time (or at least until the useful life of the buildings has ended)

that will, without a mechanism for a rent adjustment, deny an owner of rental housing a fair return.

The waiver mechanism is irrelevant to this difficulty. The waiver provision applies when a property owner can prove the lack of a nexus between development and the need for low-income housing; the waiver provision is not available for property owners who wish to claim that the lack of a rent adjustment mechanism fails to assure the owners of rental property a fair return in the future. Indeed, the waiver provision has no relevance at all in the future after the rental units are built and when the owners may be saddled with unanticipated and unrecoupable costs.

Home Builders alleges that the lack of any mechanism to ensure that owners of rental units obtain a fair rate of return violates the Due Process Clauses of the state and federal constitutions.[12] Home Builders did not allege that the property owners were entitled to a fair return at the construction phase, but only that they, or the ultimate owners of the rental units, be allowed to obtain a fair return in the future. As this Court's opinion in *Duquesne Light Co.*, and the cases cited therein, demonstrate, when a rate regulation results in a rate that is too low, the Constitution is violated. The complete lack of a mechanism that would allow the rents to be adjusted in the future to take into account changed circumstances makes the challenged ordinance in violation of the Due Process Clause.

In every other jurisdiction with rent control in the nation known to Petitioner, mechanisms exist that allow rent adjustments in order to ensure that landlords have a reasonable opportunity to obtain a fair return. Without such a mechanism, a rent control ordinance is void on its face.

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[12] *See, e.g.*, Complaint ¶¶ 34-37, Joint Appendix below at 10.

In *Mayes v. Jackson Township Rent Leveling Board*, 511 A.2d 589, 591 (N.J. 1986), *cert. denied*, 479 U.S. 1090 (1987), the New Jersey Supreme Court held:

> Stating the general principle applicable to these cases is easy. "[A] rent control ordinance must permit an efficient landlord to realize a 'just and reasonable return' on [the] property."

(Citation omitted.) The court admitted that it may be difficult to determine an appropriate formula for determining a "just and reasonable return." It is, of course, impossible to meet such a standard when, as here, rents can never be adjusted to account for changed economic circumstances.

Similarly, in New York Justice Cardoza held that

> [a] statute prescribing rates is one of continuing operation. It is an attempt by the legislature to predict for future years the charges that will yield a fair return. *The prediction must square with the facts, or be cast aside as worthless.* It must square with them in one year as in another, at the beginning but equally at the end.

Municipal Gas Co. of Albany v. Public Serv. Comm'n, 121 N.E. 772, 774 (N.Y. 1919) (emphasis added; citation omitted). In the present case, in contrast, rental rates will forever more be tied to a formula relating to the median income of Napa residents. The City of Napa and the court below never so much as asserted that a rental rate tied to the median income of residents had any relevance to a fair return. In contrast to Judge Cardoza's holding, this formula makes it virtually impossible to ensure a fair return at any time from now until the end of the useful life of the rental units.

The Massachusetts Supreme Court considered the formula required to ensure a fair return or "fair net operating income" in *Marshal House, Inc. v. Rent Control Board of Brookline*, 266

N.E.2d 876, 887-88 (Mass. 1971). It found that to be constitutional, a rent control ordinance requires fair return on investment as the standard rather than a fair return on the fair market value of the property. This holding is in conflict with the decision below, which requires no guarantee of a "fair net operating income" regardless of the standard.

The only contrary case comes from the wartime Federal Emergency Court of Appeals which held, that during the temporary war emergency, it would be too difficult to administer a requirement that landlords achieve a fair return on market value. *Wilson v. Brown*, 137 F.2d 348, 354 (Temp. Emer. Ct. App. 1943).

To summarize, the decision below is in manifest conflict with the holdings of this Court that were summarized in *Duquesne Light Co.* and with nearly every other jurisdiction that has assessed whether a rent control measure meets constitutional standards.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: December, 2001.

Respectfully submitted,

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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE
DISTRICT DIVISION FIVE

FILED
June 6, 2001
As Amended
July 2, 2001

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA,	
Plaintiff and Appellant,	A090437
v.	(Napa County
CITY OF NAPA, et al.,	Superior Ct.
Defendants and Respondents,	No. 26-07228)
NAPA VALLEY COMMUNITY HOUSING, et al.,	
Intervenors and Respondents.	

Home Builders Association of Northern California (HBA) appeals from a judgment entered after the trial court sustained a demurrer and dismissed its complaint asserting a facial challenge to an inclusionary zoning ordinance that was enacted by the City of Napa (City). HBA contends primarily that the trial court erroneously applied Federal and California takings law. We disagree and will affirm the judgment.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.C and II.E.

Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.B.3, II.C through E.

I. FACTUAL AND PROCEDURAL BACKGROUND

City, like many other localities in California, has a shortage of affordable housing. This shortage has negative consequences for all of City's population, but causes particularly severe problems for those on the lower end of the economic spectrum. Manual laborers, some of whom work in the region's wine or leisure industries, are forced to live in crowded, substandard housing. There is a large, and growing population of homeless, including many families and teenagers. Workers from low income families increasingly are forced to live greater distances from their places of employment, which causes increased traffic congestion and pollution.

City formed the Napa Affordable Housing Task Force to address these problems. The task force was a broad based community group that included representatives from non-profit agencies, environmental groups, religious institutions, local industries, for-profit developers, and the local chamber of commerce. The purpose of the task force was to "study the issues surrounding affordable housing in the City of Napa and . . . make recommendations to the Housing Authority Commission."

The task force studied housing issues for several months. It formed subcommittees, conducted public hearings, and evaluated affordable housing solutions that had been enacted by other communities. Ultimately the task force recommended

that City enact an inclusionary housing ordinance[1] modeled after one that had been enacted by Napa County.

City responded by enacting the inclusionary zoning ordinance[2] that is at issue in the present appeal. The ordinance applies to all development in the city, including residential and non-residential.

The primary mandate imposed by the ordinance on residential developers is a requirement that ten percent of all newly constructed units must be "affordable" as that term is defined.[3] The ordinance offers developers two alternatives. First, developers of single-family units may, at their option, satisfy the so called inclusionary requirement through an "alternative equivalent proposal" such as a dedication of land, or the construction of affordable units on another site. Developers of multi-family units may also satisfy the 10 percent requirement through an "alternative equivalent proposal" if the City Council, in its sole discretion, determines that the proposed alternative results in affordable housing opportunities equal to or greater than those created by the basic inclusionary requirement.

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[1] An "inclusionary zoning" or "inclusionary housing" ordinance is one that requires a residential developer to set aside a specified percentage of new units for low or moderate income housing. (See Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability* (1995) 23 Hofstra Law Review 539, 540.)

[2] In fact, City enacted two ordinances to address the inclusionary housing problem. We will refer to the ordinances collectively as the "inclusionary zoning ordinance" or simply, "the ordinance."

[3] The definition of "affordable" in the ordinance is complex. In general, the term refers to an amount that could be paid by persons who live in a household that earns significantly less than the area median income.

As a second alternative, a residential developer may choose to satisfy the inclusionary requirement by paying an in-lieu fee. Developers of single-family units may choose this option by right, while developers of multi-family units are permitted this option if the City Council, again in its sole discretion, approves. All fees generated through this option are deposited into a housing trust fund, and may only be used to increase and improve the supply of affordable housing in City.

Developments that include affordable housing are eligible for a variety of benefits including expedited processing, fee deferrals, loans or grants, and density bonuses that allow more intensive development than otherwise would be allowed. In addition, the ordinance permits a developer to appeal for a reduction, adjustment, or *complete waiver* of obligations under the ordinance "based upon the absence of any reasonable relationship or nexus between the impact of the development and . . . the inclusionary requirement."

HBA is a non-profit corporation and association of builders, contractors, and related trades and professionals involved in the residential construction industry. In September 1999, HBA filed a complaint against City seeking to have the inclusionary zoning ordinance declared facially invalid. As is relevant here, HBA alleged the ordinance violated (1) the takings clauses of the Federal and State Constitutions, (2) the Mitigation Fee Act (Gov. Code, §§ 66000, et seq.), (3) the due process clause of the Federal Constitution, and (4) Proposition 218.

City demurred to the complaint arguing it was entitled to prevail as a matter of law. City supported its demurrer with nearly 700 pages of reports and materials that it had relied upon when adopting the ordinance.

In December 1999, the trial court allowed a group of persons and entities to intervene in the action in support of the ordinance.[4]

The intervenors joined City's demurrer.

The trial court sustained the demurrer without leave to amend, and entered judgment in favor of City and the intervenors. This appeal followed.

II. DISCUSSION

A. Introduction and Standard of Review

HBA contends the trial court erred when it sustained the demurrer to its complaint. In arguing City's inclusionary zoning ordinance is facially invalid, HBA again asserts the ordinance violates (1) the takings clauses of the Federal and State constitutions, (2) the Mitigation Fee Act (Gov. Code § 66000, et seq.), (3) the due process clause of the Federal Constitution, and (4) Proposition 218.

The standard of review we apply is familiar. On appeal from a judgment of dismissal after an order sustaining a demurrer, the appellate court reviews the record de novo, to determine whether the complaint states a cause of action as a matter of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) All facts properly pleaded are deemed to be true. (*Ibid.*)

With these principles in mind, we consider the arguments that have been advanced concerning each claim.

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[4] The intervenors were Napa Valley Community Housing, Non-Profit Housing Association of Northern California, Housing California, Patricia Domingo, Heather Clayton, Donna Simon, Hilda Avina, Rainy Stegall, and Hector Candelario.

B. Takings Issues

1. Is the Ordinance Facially Invalid?

HBA contends that City's inclusionary zoning ordinance is facially invalid because it violates the taking clauses of the Federal and State Constitutions.

A claimant who advances a facial challenge faces an "uphill battle." (*Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 495.) "'A claim that a regulation is *facially* invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional *application* to the complaining parties.'" (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App. 4th 523, 547, quoting *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1442.) This is because a facial challenge is predicated on the theory that "the mere enactment of the . . . ordinance worked a taking of plaintiff's property . . . ." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 24.)

Here, City's inclusionary zoning ordinance imposes significant burdens on those who wish to develop their property. However the ordinance also provides significant benefits to those who comply with its terms. Developments that include affordable housing are eligible for expedited processing, fee deferrals, loans or grants, and density bonuses. More critically, the ordinance permits a developer to appeal for a reduction, adjustment, or *complete waiver* of the ordinance's requirements. Since City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking.

HBA contends the ordinance's waiver clause does not preclude a facial challenge because that clause improperly places the burden on the developer to prove that a waiver would be appropriate when the City has not established a justification

for the exactions mandated by the ordinance. According to HBA, allocating the burden in this way is inconsistent with *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391, footnote 8. HBA misreads *Dolan*. Quite to the contrary, the Supreme Court stated in *Dolan*, that when evaluating the validity of generally applicable zoning regulations, it is appropriate to place the burden on the party who is challenging the regulation. (*Ibid.*) As we will discuss below, City's inclusionary zoning ordinance is a generally applicable legislative enactment rather than an individualized assessment imposed as a condition of development. Thus, the burden shifting standard described in *Dolan* does not apply.

2. Does the Ordinance Substantially Advance a Legitimate Interest?

The Fifth Amendment to the United States Constitution states that "private property [shall not] be taken for public use without just compensation." Article I, section 19 of the California Constitution contains similar language, stating that governmental entities must pay just compensation when they "take" private property for public use.

In *Agins v. Tiburon* (1980) 447 U.S. 255, the Supreme Court provided a test to determine whether a taking has occurred. The court said, "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land . . . ." (*Id.* at p. 260.)

Here, HBA contends that City's inclusionary zoning ordinance effects a taking under the first of these tests; i.e., that the ordinance is invalid because it fails to substantially advance legitimate state interests. We are unpersuaded.

First, we have no doubt that creating affordable housing for low and moderate income families is a legitimate state

interest. Our Supreme Court has said that the "assistance of moderate-income households with their housing needs is recognized in this state as a legitimate governmental purpose." (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 970.) This conclusion is consistent with repeated pronouncements from the state Legislature which has declared that "the development of a sufficient supply of housing to meet the needs of *all Californians* is a matter of statewide concern," (Gov. Code, § 65913.9, emphasis added) and that local governments have "a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of *all economic segments of the community*." (Gov. Code, § 65580, subd. (d), emphasis added.) Indeed, Witkin lists 12 separate statutes that are "designed to stimulate the construction of low and moderate income housing by the private sector." (4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property § 54, p. 275; *id.* (2000 Supp.) § 54, p. 134.)

Second, it is that City's inclusionary zoning ordinance will "substantially advance" the important governmental interest of providing affordable housing for low and moderate income families. By requiring developers in City to create a modest amount of affordable housing (or to comply with one of the alternatives) the ordinance will necessarily increase the supply of affordable housing. We conclude City's ordinance "substantially advance[s] legitimate state interests." (*Agins v. Tiburon*, *supra*, 447 U.S. at p. 260.)

HBA's principal constitutional claim is that City's ordinance is invalid under *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, and *Dolan v. City of Tigard*, *supra*, 512 U.S. 374.

In *Nollan* the court discussed the "substantially advance" test in the context of a governmental requirement that appellant property owners dedicate a portion of their beachfront property

to the public as a condition for obtaining a rebuilding permit. In the course of its discussion, the court said there must be an "essential nexus" between a condition imposed on the use of land, and the impacts caused by the proposed use. (*Nollan v. California Coastal Comm'n, supra*, 483 U.S. at p. 837.)

Dolan also involved dedications of property that were a condition for granting a development permit. There the court said that a "rough proportionality" standard "best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Dolan v. City of Tigard, supra*, 512 U.S. at p. 391.)

HBA contends City's ordinance is invalid under *Nollan* and *Dolan* because there is no "essential nexus" or "rough proportionality" between the exaction required by the ordinance, and the impacts caused by development of property.

We reject this argument because *Nollan* and *Dolan* are inapplicable under the facts of this case. "[T]he intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address . . . land use 'bargains' between property owners and regulatory bodies—those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development. It is in this paradigmatic permit context—where the individual property owner-developer seeks to negotiate approval of a planned development—that the combined *Nollan* and *Dolan* test quintessentially applies." (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 868.) "But a different standard of scrutiny [applies] to development fees that are generally applicable through legislative action 'because the heightened risk of the "extortionate" use of the police power to exact

unconstitutional conditions is not present.'"[5] (*Santa Monica Beach, Ltd. v. Superior Court*, *supra*, 19 Cal.4th at p. 966, quoting *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th at p. 876.) "[I]ndividualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*, whereas generally applicable development fees warrant the more deferential review that the *Dolan* court recognized is generally accorded to legislative determinations." (*Santa Monica Beach, Ltd. v. Superior Court*, *supra*, 19 Cal.4th at pp. 966-967.) The justification for these varying levels of scrutiny is founded in the nature of the two types of exactions. "It is one thing for courts to make a government agency adhere to its own justification for requiring the dedication of a particular portion of property as a condition of development; such adherence safeguards against the possibility that the justification is merely a pretext for taking the property without paying compensation. . . . But it is another thing for courts to require that a complex, generally applicable piece of economic legislation that will have many effects on many different persons and entities accomplish precisely the goals stated in a legislative preamble in order to preserve its constitutionality." (*Santa Monica Beach, Ltd. v. Superior Court*, *supra*, 19 Cal.4th at p. 972.)

Here, we are not called upon to determine the validity of a particular land use bargain between a governmental agency and a person who wants to develop his or her land. Instead we are faced with a facial challenge to economic legislation that is generally applicable to *all* development in City. We conclude the heightened standard of review described in *Nollan* and *Dolan* is inapplicable under these facts.

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[5] While the court in *Santa Monica Beach*, discussed the scope of *Nollan* and *Dolan* in the context of "development fees," the court has made clear that the same analysis applies whether a governmental entity requires the conveyance of property, or the payment of a fee. (See *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th at p. 876.)

3. Other Takings Issues

HBA advances two additional arguments on the takings issue.

First HBA contends that even if the heightened level of scrutiny set forth in *Nollan* and *Dolan* are inapplicable, City's inclusionary zoning ordinance is still invalid under California cases such as *Rohn v. City of Visalia* (1989) 214 Cal.App.3d 1463, *Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, and *Liberty v. California Coastal Com.* (1980) 113 Cal.App.3d 491. These decisions are inapposite. The issue in each was the validity of an ad hoc condition that was imposed on an individual developer. None of them involved a facial challenge to a generally applicable zoning ordinance that imposed obligations on all development in a given area. We conclude *Rohn*, *Whaler's Village*, and *Liberty* are not applicable under the facts of this case.

HBA also contends that the inclusionary zoning ordinance is invalid because the lack of housing for low and moderate income families in City is the product of City's own prior restrictive land use policies.

HBA has not cited any authority to support the proposition that a zoning ordinance which tries to solve problems caused by prior legislative decisions is invalid, and case law is directly to the contrary. For example, in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, the Supreme Court ruled that New York could enact a landmark preservation law that was designed to mitigate the effects of prior policies that permitted "large numbers of historic structures, landmarks, and areas" to be destroyed. (*Id.* at p. 108.) If New York can enact a landmark preservation law to remedy a shortage of historic buildings created by its prior policies, City can enact an inclusionary zoning ordinance even if its prior policies contributed to a scarcity of available land and a shortage of affordable housing.

C. Mitigation Fee Act

HBA contends the "inclusionary zoning law violates Government Code sections 66000 through 66022 . . . ." These statutes are commonly described as the Mitigation Fee Act. (See Gov. Code, § 66000.5.)

HBA's briefs on this issue are notably brief; HBA invites an analysis, but does not provide it. While HBA claims that City's ordinance violates the Mitigation Fee Act, its briefs do not discuss that issue. Instead they focus solely on whether it was appropriate to bring a facial challenge to any fees that might someday be paid under the ordinance. How the ordinance might violate the Mitigation Fee Act is not discussed or developed.

By framing its argument this way, HBA has forgotten to teather the procedural cart to the substantive horse. Even if we were to assume that a facial challenge is appropriate, this does not prove that City's ordinance violates the Mitigation Fee Act. In the absence of argument or authority that indicates City's ordinance is invalid under the Mitigation Fee Act, we deem the issue waived. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App. 4th 974, 979.)

D. Due Process

HBA contends the inclusionary zoning ordinance is facially invalid under the due process clause of the Federal Constitution because it "requires property owners who develop residential housing to sell or rent 10% of their units at prices or rents that are based entirely upon certain fixed percentages of the income levels of lower and very low-income households." Imposing such a requirement violates the due process clause, HBA argues, because "the inclusionary zoning law provides no mechanism to make a fair return for property owners who are forced to sell or rent units at an amount unrelated to market prices."

We doubt seriously that HBA is entitled to a "fair return" under the due process clause. The "fair return"' standard is commonly used to evaluate restrictions placed on historically regulated industries such as railroads and public utilities. (See, e.g., *Power Comm'n v. Pipeline Co.* (1942) 315 U.S. 575.) It has also been used to evaluate rent control ordinances. (See e.g. *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 679.)

However HBA has not cited, and we are not aware of, any case that holds a housing developer is entitled to "fair return" on his or her investment.

However we need not base our decision on this ground. First, it is not literally correct to say that City's ordinance "requires property owners who develop residential housing to sell or rent 10% of their units [to low income individuals]." Under the ordinance, any person who does not want to sell or rent a portion of his or her housing units to low income individuals may choose one of the alternatives, such as donating vacant land or paying an in-lieu fee. Thus HBA's argument is based on an incorrect premise.

Second, and more importantly, HBA's facial due process challenge must necessarily fail. As we have said, "'A claim that a regulation is *facially* invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional *application* to the complaining parties.'" (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo*, *supra*, 38 Cal.App.4th at p. 547, internal citation omitted.) When an ordinance contains provisions that allow for administrative relief, we must presume the implementing authorities will exercise their authority in conformity with the Constitution. (See *Fisher v. City of Berkeley*, *supra*, 37 Cal.3d at p. 684.)

Here, as we have noted, City's ordinance includes a clause that allows city officials to reduce, modify or waive the requirements contained in the ordinance "based upon the absence of any

reasonable relationship or nexus between the impact of the development and . . . the inclusionary requirement." Since City has the authority to completely waive a developer's obligations, a facial challenge under the due process clause must necessarily fail.

HBA contends the waiver clause does not preclude a facial challenge because it does not state expressly that a waiver may be granted based on a lack of a "fair return." However the power of an agency to make adjustments to guarantee a fair return is "not limited to those literally granted by the ordinance . . . ." (*City of Berkeley v. City of Berkeley Rent Stabilization Bd.* (1994) 27 Cal.App.4th 951, 962.) When this standard is not expressly stated, it is "present by implication." (*Ibid.*)

E. Proposition 218

In November 1996, the voters approved Proposition 218 which added article XIII D to the California Constitution. Section 3, subdivision (a) of article XIII D states that "No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except . . . [¶] . . . [¶] . . . as provided by this article." Section 2, subdivision (e) defines a fee as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service."

HBA contends the in-lieu fee option contained in City's inclusionary zoning ordinance violates Proposition 218 because the "ability to develop property in a reasonable manner is a right guaranteed by the state and federal Constitutions." Thus HBA contends the in-lieu fee option is invalid because it is imposed on "an incident of property ownership."

Our Supreme Court recently rejected this same argument in *Apartment Assn. of Los Angeles County, Inc. v. City of Los*

Angeles (2001) 24 Cal.4th 830. The issue there was the validity of a Los Angeles city ordinance that imposed an inspection fee on private landlords. The plaintiffs argued the fee was invalid under proposition 218. The Supreme Court rejected this argument because the fee was "imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business." (*Id.* at p. 840.) The court ruled that under those circumstances, proposition 218 did not apply. As the court explained, "article XIII D, section 3, provides that '[n]o tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except . . . [¶] . . . [¶] . . . as provided by this article.' (See also *id.*, § 2, subd. (e).) In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners as *landowners*. The ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business—i.e., because they are landlords. What plaintiffs ask us to do is to alter the foregoing language—changing 'as an incident of property ownership' to 'on an incident of property ownership.' But to do so would be to ignore its plain meaning—namely, that it applies only to exactions levied solely by virtue of property ownership. We may not interpret article XIII D as if it had been rewritten." (*Id.* at pp. 841-842, fn. omitted.)

The in-lieu fee option contained in City's inclusionary zoning ordinance only comes into play if a land owner elects to develop his property. It is not imposed "solely by virtue of property ownership." (*Apartment Assn. of Los Angeles v. City*

of Los Angeles, *supra*, 24 Cal.4th at p. 842.) The fee does not violate proposition 218.

III. DISPOSITION

The judgment is affirmed.

JONES, P.J.

We concur:

STEVENS, J.

SIMONS, J.

Appendix B–1

Court of Appeal, First Appellate District, Division Five

No. A090437

S099170

Filed September 12, 2001

IN THE SUPREME COURT OF CALIFORNIA

En Banc

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA, Plaintiff and Appellant,

v.

CITY OF NAPA et al., Defendants and Respondents;

NAPA VALLEY COMMUNITY HOUSING et al., Interveners and Respondents.

Petition for review DENIED.

GEORGE,
Chief Justice

Appendix C–1

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 5
Filed June 27, 2001

HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA,

Plaintiff and Appellant,

v.

CITY OF NAPA, et al.,

Defendants and Respondents.

A090437

Napa County No. 2607228

BY THE COURT:

The petition for rehearing is denied.

Date: JUN 27 2001 JONES, P.J. P.J.

Appendix D–1

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FILED July 2, 2001

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA, Plaintiff and Appellant, v. CITY OF NAPA et al., Defendants and Respondents, NAPA VALLEY COMMUNITY HOUSING et al., Intervenors and Respondents.	A090437 (Napa County Super. Ct. No. 26-07228) **ORDER MODIFYING OPINION (NO CHANGE IN JUDGMENT)**

THE COURT:

Upon the court's own motion, the opinion filed June 6, 2001, is modified as follows:

1. On page 1 of the opinion, first footnote which states, "Pursuant to California Rules of Court, rules 97(b) and 976.1, this opinion is certified for publication with the exception of parts II.B.3, II.C through E" is deleted and replaced with the following footnote:

> Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.C and II.E.

Appendix D–2

This modification does not change the judgment.

Dated: JUL 02 2001 JONES, P.J., P.J.

Appendix E–1

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF NAPA

Filed April 17, 2000

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA,

Plaintiff and Petitioner,

v.

CITY OF NAPA AND ALL PERSONS INTERESTED IN THE MATTER OF THE VALIDITY OF RESOLUTION NO. R1999/161, CITY OF NAPA ORDINANCE NO. 01999/19, CITY OF NAPA ORDINANCE NO. 01999/20, AND CITY OF NAPA MUNICIPAL CODE 15.94,

Defendants and Respondents,

/

NAPA VALLEY COMMUNITY HOUSING, a California nonprofit corp.; NON-PROFIT HOUSING ASSOCIATION OF NORTHERN CALIFORNIA, an unincorporated association; HOUSING CALIFORNIA, a California nonprofit corp.; PATRICIA DOMINGO; HEATHER CLAYTON; DONNA SIMON; HILDA AVINA; RAINY

CASE NO.: 26-07228

JUDGMENT

STEGALL; AND HECTOR CANDELARIO,

Real Parties in Interest and Intervenors./

This action came on for hearing on Defendant City of Napa's demurrer to the Action for Declaratory Relief, Determination of Invalidity, and Petition for Writ of Mandate of the Home Builders Association of Northern California on January 14, 2000, before the Honorable Scott W. Snowden. Kirk E. Trost, Esq. and Thomas B. Brown, Esq., appeared as attorneys for the City of Napa; Richard A. Marcantonio, Esq., Michael Rawson, Esq., and Dara L. Schur, Esq. appeared as attorneys for Intervenors/Real Parties in Interest Napa Valley Community Housing, Non-profit Housing Association of Northern California, Housing California, Patricia Domingo, Heather Clayton, Donna Simon, Hilda Avina, Rainy Stegall, and Hector Candelario; James S. Burling, Esq. appeared as attorney for Plaintiff and Petitioner Home Builders Association of Northern California.

After hearing on the demurrer, the matter was submitted to the Court for ruling. The Court, having read and considered the supporting and opposing points and authorities and the matters submitted to it for judicial notice, and having heard and considered the arguments of counsel, and good cause appearing therefor, the Court sustained the demurrer without leave to amend on the grounds that each and every cause of action and/or claim in Plaintiff and Petitioner's action for declaratory relief, determination of invalidity, and petition for writ of mandate, fails to state facts sufficient to constitute a cause of action.

IT IS ADJUDGED that:

1. Judgment be entered in favor of Defendant and Respondent City of Napa and Real Parties in Interest and

Intervenors, and against Plaintiff and Petitioner Home Builders Association of Northern California;

2. Plaintiff and Petitioner Home Builders Association of Northern California recover nothing from Defendant and Respondent City of Napa, or from Real Parties in Interest and Intervenors;

3. Plaintiff and Petitioner Home Builders Association of Northern California's requests for declaratory relief, determination of invalidity, and petition for writ of mandate are denied; and

4. Defendant and Respondent, and Real Parties in Interest and Intervenors shall recover against Plaintiff and Petitioner costs according to memoranda of costs to be filed with the Court.

DATED: 4/13, 2000

W. SCOTT SNOWDEN
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM:

/s/ James S. Burling 3-29-00
JAMES S. BURLING
Counsel for Plaintiffs

Appendix F–1

ORDINANCE O1999/19

AN URGENCY ORDINANCE OF THE CITY OF NAPA, COUNTY OF NAPA, STATE OF CALIFORNIA, ADDING CHAPTER 15.94 TO THE NAPA MUNICIPAL CODE CREATING AND ESTABLISHING A HOUSING TRUST FUND, A HOUSING IMPACT FEE ON NON-RESIDENTIAL DEVELOPMENT AND ESTABLISHING AN INCLUSIONARY IN-LIEU FEE REQUIREMENT FOR RESIDENTIAL DEVELOPMENT PROJECTS

Be it ordained by the City Council of the City of Napa as follows:

Section 1. With respect to non-residential development, the Council finds as follows:

A. New office, retail, industrial, hotel, warehouse, wine production and other non-residential uses (hereinafter referred to as "non-residential uses" or "non-residential development projects") in the City of Napa ("City") have been, and continue to be, a major factor in attracting new employees to the region. A number of these employees and their families reside, or will reside, in the City of Napa. These new employees and their families create a need for additional housing in the City of Napa.

B. Traditionally these non-residential uses have benefited from a supply of housing for their employees available at competitive prices and locations close to the place of employment. However, in recent years, the supply of housing has not kept pace with the demand for housing created by these new employees and their families, if this shortage were to grow or continue, employers would have increasing difficulty in locating in or near the City of Napa due to problems

associated with attracting a labor force. Employees would be unable to find appropriate housing in the area, and accordingly would be forced to commute long distances. This situation would adversely affect their quality of life, consume limited energy resources, increase congestion on already overcrowded highways and have a negative impact on air quality.

C. The competition for housing is especially acute with respect to households of low income (those households with incomes of 80% or below median income for Napa County). An identifiable portion of the new employees attracted to the City of Napa by new non-residential development will live in low and very low income households and will therefore compete with present residents for scarce affordable housing units in the City. Increasing the production and availability of low-income housing is especially problematic. Prices and rents for housing affordable to households of low and very low income remain below the level needed to attract new construction. This is even more true for households of very low income (those with incomes 50% or below median income for Napa County). Federal and State housing finance and subsidy programs are not sufficient by themselves to satisfy the low-income housing requirements associated with this employment.

D. On November 17, 1992, the Council adopted the Housing Element of the City of Napa General Plan. The Housing Element calls for the provision of additional housing for all sectors of the population, to accommodate the demands of both existing and new residents attracted to the region by increased employment. The Housing Element also provides that the City should make special efforts to encourage an increased supply of housing affordable to low and very low income households. More specifically, the City of Napa within its Housing Element, committed itself to the establishment of a City Inclusionary Housing Program and an Industry-Housing Linkage Program as key elements of its plan to help ensure that

housing will be available for all economic segments, as required by State law.

E. The City, with assistance from the NCCDC Affordable Housing Task Force and the Jobs-Housing Nexus Study Advisory Committee, studied housing needs throughout all jurisdictions, and the financial mechanisms available to address those needs, in Napa County. The resultant City of Napa and Napa County Jobs-Housing Nexus Study, September 1992, updated as of February 16, 1999 ("Nexus Report"), which is hereby incorporated by reference, examined the connection between non-residential development projects and the housing needs of moderate, low and very low income households. The Nexus Report concluded that a clear nexus can be established between the employees of various commercial and industrial buildings or land use types and the number of moderate, low and very low income employee households that are directly associated with such buildings and that will accordingly impact the housing market in and around Napa City. The Nexus Report further quantified the share of this need represented by low and very low income households.

F. Non-residential development brings in new employees, a significant percentage of those employees will live in the City, and that this number yields a certain number of households from which a definable number will be of low or very low income. Adjustments may be made to this number of households to take into account household size, multiple earner households, previously housed employees, etc., to yield the approximate per square foot contribution each employment activity contributes to the net new need for a housing subsidy. Based on the Nexus Report, each additional square foot of office development creates a need for low-income housing assistance in an amount of $17.65; retail development creates a need of $17.10 per square foot; industrial development creates a need of $6.52 per square foot; hotel development creates a need of $10.23 per square foot; warehouse development creates

a need of $2.49 per square foot; and the development of wine production facilities creates a need of $6.52 per square foot.

G. The City housing fee is established to implement the goals and objectives of the City of Napa General Plan, including the Housing Element and related environmental documents, the Napa City General Plan Environmental Impact Report, the NCCDC Affordable Housing Finance Task Force report and recommendations and the Nexus Report, together with the reports appended thereto or referenced therein quantifying the nexus between development and low-income housing need. Further to mitigate the impacts caused by new non-residential development in the city of Napa that is appropriate to impose some of the cost of the increased burden of providing housing for low and very low income households necessitated by such non-residential development directly upon the sponsors of the development. The imposition of a housing impact fee is an appropriate means to accomplish this purpose. However, the Council recognizes that establishing a fee at the upper range of the identified burden could have a negative effect on the City's ability to compete in the regional market for non-residential development projects. Thus, in calculating the amount of the housing impact fee, the Council has carefully weighed other factors in addition to the simple calculation of contribution. These include impact of the fee on construction costs, the need to foster the City's competitive position, special factors and hardships associated with certain types of development, and legal issues. Any increases in such fees in the future should consider these same criteria. In view of the numerous assumptions which must attend any such studies and conclusions, the Council has determined that the fee requirements will be set well below the calculated cost of providing market rate low-income housing to persons attracted to the City by corresponding employment opportunities. Further, in order to reduce the initial impact of these fees on the development

community, the Council has determined to phase the fee program in over time.

H. Most non-residential land uses in the City clearly fall within one of the six basic use types studied in the Nexus Report, and are charged a fee accordingly in this ordinance. In a limited number of situations, the fee must be based on a project-by-project determination due to insufficient information as to the general characteristics as to that type of use or special attributes which make building size an inappropriate indicator of employee density.

I. It is recognized that it is inappropriate to impose this housing fee requirement on certain types of non-residential uses because the fee would violate previous development agreements or other quasi-contractual agreements, or is preempted by state law; or because special characteristics of the use otherwise mitigate the impacts or are in themselves mitigation measures to assist the same low-income population to which this ordinance is addressed or because it can be determined that the use categorically will have few or no employees, thus negating the required nexus.

J. One of the purposes of this ordinance is to establish a feasible means by which developers of non-residential development projects assist in increasing the supply of low and very low income housing. The housing fee requirements contained in this ordinance are designed to create a rational relationship between the amount of housing need created by the employment use and the size of the fee, taking into account the impact of such fee on housing construction costs and economic feasibility.

K. The need to provide safe and sanitary dwelling accommodations to persons of low and moderate income is a matter of Citywide concern and represents a responsibility that should be borne by all sectors of the community. The enactment of a housing fee for non-residential development

only partially addresses the total impacts caused by non-residential developments and is intended as one part of the City's multi-faceted approach to affordable housing problems. Further regulatory changes to encourage the production of low-income housing will also be considered to address the existing and future need.

Section 2. With respect to residential development, the City Council finds and declares as follows:

A. Rental and owner-occupied housing in the City has become more and more expensive over time. Housing costs have gone up faster than incomes for many groups in the community.

B. Many persons who cannot afford housing in the City of Napa work in the City, have grown up or have family ties in the City, already live and work in the City but must move because housing is no longer affordable, or wish to live in the City for other reasons.

C. Federal and State government programs do not provide nearly enough affordable housing or subsidies to satisfy the housing needs of low or moderate income households who want or need housing in the City. Newly constructed housing is available in the City, with rare exceptions, only at prices which low and moderate income households cannot afford to pay. This problem has been exacerbated in the past by the fact that local government has at times failed to take a sufficiently active role in the affordable housing effort.

D. Rising land prices have been a key factor in preventing development of new affordable housing. New market rate housing construction in the City aggravates the existing shortage of affordable housing by absorbing the supply of available residential land. This not only reduces the supply of land for affordable housing but further increases the price of remaining residential land. At the same time, new housing

contributes to the demand for goods and services in the City, increasing local employment at wage levels which often do not permit employees to afford housing in the City.

E. Rising land prices and the resultant lack of affordability of housing for local residents and people working in the City are further exacerbated by the high demand for second homes, luxury homes and housing for new residents who commute to the greater Bay Area to work. The use of limited residential land for these purposes further increases the price of remaining residential land.

F. The desirability of the City as a place for second homes, luxury homes and as a bedroom community for workers in the greater Bay Area labor market results from strong agricultural protection and open space policies resulting in a desirable living environment which in turn makes housing affordability for local residents who work in local industries even more difficult to achieve. The City's General Plan contains policy statements favoring the protection of agriculture and open space in the County and directing housing and other urban uses to the urban areas, through the use of a Rural Urban Limit Line (RUL) to denote limits on urban development. These factors and an observed pattern of substantial remodels and demolition/replacement in agricultural areas are probably related; remodeled and replacement dwellings often eliminate older residential units that can economically provide more affordable housing. High percentages of newly constructed or remodeled homes in the upper end of the housing market further exacerbate the affordable housing problem by creating greater needs for many services typically provided by low-income employees.

G. Because neither the private market nor the public sector has as yet provided the levels of housing affordability necessary for the maintenance of a balanced community, local government must take an active lead to insure an adequate

supply of housing for residents and working people of all income levels.

H. The citizens of the City wish to retain a balanced community, with housing available to low and moderate income households. The City agrees with the established policy of the State of California that each community should make available an adequate supply of housing to persons at all economic levels. The City's use of its police power to regulate housing production in ways designed to achieve such a mix of units in the community is appropriate. As stated above, the Council has adopted the Housing Element of the City of Napa General Plan which supports the provision of additional housing for all sectors of the population, with an emphasis on the increased supply of housing affordable to low and very low income households, and calls for the establishment of an Inclusionary Housing program.

I. A balanced community is only possible if part of the new housing built in the City of Napa is affordable to low and moderate income households. Amending the land use regulations of the City to require builders of new housing to include some housing affordable to low or moderate income households, or to otherwise contribute to the effort to increase the supply of affordable housing in the City, is fair, not only because new development contributes to the shortage of affordable housing, but also because the land use regulations of the City in regard to new housing in the City should be consistent with the community's goal of .providing an adequate supply of housing for residents and working people of all income levels. Further in order to mitigate the impacts caused by new residential development in the City of Napa, it is appropriate to impose some of the cost of the increased burden of providing housing for low and very low income household directly upon the sponsors of the development contributing to the shortage of affordable housing.

J. The Council shall encourage the building and availability of affordable housing in the City by providing incentives and reducing the constraints on such development in the community. In this regard, the Council intends to consider such things as the establishment of public/private partnerships and the provision of incentives to the building community as provided by law and in the Housing Element of the City of Napa General Plan.

K. Maintaining the affordability of units constructed under this ordinance best serves the goal of assuring a continuing supply of affordable housing for local residents and people who work in the City of Napa but cannot afford to live here. If affordable units are not restricted so as to continue to be affordable at the time of resale, then such units will become market rate units within a relatively short period of time and, with the limited supply of residential land combined with increasing local land and building costs, the units will not be replaceable.

L. The requirements of this ordinance are minimum requirements. The City reserves the right to require additional measures to further affordable housing to the extent it has authority to do so without respect to this ordinance. As mentioned above, the efforts contained in this ordinance are simply one aspect of the City's developing strategy to address affordable housing needs on a variety of fronts.

M. Pursuant to Government Code Section 65913.2, the City Council has considered, the effects of these actions on the City's housing needs as established in the Housing Element of the General Plan.

Section 3. Chapter 15.94 is hereby added to the Napa Municipal Code to read as follows:

Chapter 15.94

CITY OF NAPA HOUSING TRUST FUND, HOUSING IMPACT FEE AND INCLUSIONARY/IN LIEU FEE REQUIREMENTS

Sections:

15.94.010 Purpose
15.94.020 Definitions
15.94.030 Housing Trust Fund
15.94.040 Non-residential Development Project Housing Impact Fee
15.94.050 Residential Development Inclusionary/In-lieu Fee requirements
15.94.060 Enforcement provisions
15.94.070 Annual review
15.94.080 Adjustment

15.94.010 Purpose.

The purpose of this chapter is to establish a Housing Trust Fund, a Housing Impact Fee on developers of non-residential development projects in the City of Napa, and an inclusionary requirement or an in-lieu fee on developers of residential development projects to mitigate the impacts caused by these development projects on the additional demand for more affordable housing and rising land prices for limited supply of available residential land. The fees will be used to defray the costs of providing affordable housing for very low, low, and moderate income households in the City of Napa. The fees and inclusionary requirements required by this chapter do not replace other regulatory, development and processing fees or exactions, funding required pursuant to a development agreement or reimbursement agreement; assessments charged

pursuant to special assessments or benefit assessment district proceedings, etc., unless so specified.

15.94.020 Definitions

As used in this chapter:

A. "Addition" shall mean an extension or increase in floor area of existing development project.

B. "Affordable rent" shall mean monthly rent, including tenant paid utilities allowances as determined by the Housing Director and all fees for housing services, that do not exceed thirty percent (30%) of eighty percent (80%) of area median income for lower income households. For very low-income households affordable rents are monthly rents that do not exceed thirty percent (30%) of fifty percent (50%) of area median income. In the case where the applicant is requesting a density bonus under chapter 17.84 of the Napa Municipal Code or where the applicant is requesting direct financial assistance requiring a different rent, "affordable rent" for lower income households, shall mean monthly rents that do not exceed thirty percent (30%) of sixty percent (60%) of area median income. Affordable rent shall be based on presumed occupancy levels of one person in a studio unit, two persons in a one bedroom unit, three persons in a two bedroom unit, and one additional person for each additional bedroom thereafter.

C. "Affordable sales price" shall mean the maximum purchase price that will be affordable to the specified target income household. A maximum purchase price shall be considered affordable only if each monthly owner-occupied housing payment is equal to or less than one-twelfth of 30% of income for the specified target income household. In setting the affordable sales price, realistic assumptions regarding down payment, mortgage interest rate and term will be so that targeted income families can reasonably qualify. Affordable sales price shall be based upon presumed occupancy levels of

one person in a studio unit, two persons in a one bedroom unit, three persons in a two bedroom unit, and one additional person for each additional bedroom thereafter.

D. "Affordable units" shall mean and be limited to those dwelling units which are required to be rented at affordable rents or purchased at an affordable sales price to specified households as described in Section 15.94.050.

E. "Annual household income" shall mean the combined gross income for all adult persons living in a dwelling unit as calculated for the purpose of the Section 8 program under the United States Housing Act of 1937, as amended, or its successor.

F. "Building permit" shall mean a permit issued pursuant to Chapter 15.08 of Title 15 of the Napa Municipal Code.

G. "Chief building official" shall mean the chief building official of the City of Napa, or the designee of such individual.

H. "City" shall mean the incorporated areas of the City of Napa.

I. "Concession" or "incentive" shall have the same meaning as set forth in Chapter 17.04 of the City of Napa Municipal Code.

J. "Construction costs" shall mean the estimated cost per square foot of construction, as established by the building department of the City of Napa for use in the setting of regulatory fees and building permits, multiplied by the total square footage, minus the garage floor area, to be constructed.

K. "Developer" shall mean every person, firm, or corporation constructing, placing, or creating new non-residential or residential development directly or through the services of any employee, agent, independent contractor or otherwise.

L. "Discretionary permit" shall mean any permit or license issued by the City of Napa for a project which requires the exercise of judgment or deliberation wherein the City decides to either approve or disapprove a particular activity in accordance with applicable laws, including but not limited to use permits, and the approval or modification of tentative, or tentative parcel maps pursuant to Title 16 of the Napa Municipal Code.

M. "Dwelling unit" shall have the meaning set forth in Chapter 17.04 of the City of Napa Municipal Code.

N. "Gross square feet floor area" means the sum of the gross horizontal floor areas of a building measured from the exterior face of exterior walls, or from the center line of a wall separating two buildings. In cases where no walls exist, the gross horizontal floor area shall be that area covered by the roof excluding two feet on each side of the structure for a standard roof projection. Outside areas used for sales and/or display may also be considered (e.g., plant nurseries, building materials, auto sales, wine production, etc.) when the planning director determines that the use of the outside area significantly contributes to the employee density of the building. For purposes of the requirements of Section 15.94.050, the square footage of any tank or wine crush pad or similar non-walled wine related structure shall be included in the gross square feet of a non-residential development project.

O. "Housing Board" shall mean the Housing Trust Fund Board established pursuant to Section 15.94.030.

P. "Housing director" shall mean the housing director of the Housing Authority of the City of Napa or the designee of such individual.

Q. "Housing Fund" shall mean the City of Napa Affordable Housing Trust Fund established pursuant to Section 15.94.030.

R. "Housing Impact Fee" shall mean the fee established pursuant to Section 15.94.040 for non-residential development projects.

S. "Housing In-lieu Fee" shall mean the fee established pursuant to Section 15.94.050 for residential development projects.

T. "Low-income households" are those households with incomes of up to 80% of median income.

U. "Market rate units" shall mean dwelling units in a residential project which are not affordable units.

V. "Median income" shall mean the median income, adjusted for family size, applicable to Napa County as published annually pursuant to Title 25 of the California Code of Regulations, Section 6932 (or its successor provision) by the United States Department of Housing and Urban Development.

W. "Moderate income households" are those households with incomes of up to 120% of median income.

X. "Monthly owner-occupied housing payment" shall be that sum equal to the principal, interest, property taxes, homeowner's insurance and homeowner's association dues paid on an annual basis divided by 12.

Y. "Non-residential development project" shall mean a project for the construction, addition, or placement of a structure which is for non-residential in such land use categories such as commercial, office industrial, etc. and shall include that portion of a mixed or combined use project which includes the construction, addition or placement of a structure for non-residential use in such land use categories.

Z. "Planning director" shall mean the director of the City of Napa planning department or the designee of such individual.

AA. "Residential development project" shall mean a project for the construction or placement of any dwelling unit in a permanent location, or the subdivision of land which is planned, designed, or used for the following land use categories:

1. Single-family residential: This category consists of single-family detached units and duplexes.

2. Multi-family residential: This category consists of buildings containing three (3) or more dwelling units and mobile home parks.

BB. "Very low-income households" are those households with incomes of up to 50% of median income.

15.94.030 Housing Trust Fund

A. There is hereby established the City of Napa Affordable Housing Trust Fund (the "Housing Fund"). Separate accounts within such Housing Fund may be created from time to time to avoid commingling as required by law or as deemed appropriate to further the purposes of the Fund.

B. The Housing Fund shall be administered by the Housing Director who shall have the authority to govern the Housing Fund consistent with this chapter, and to prescribe procedures for said purpose, subject to approval by the Council.

C. A Housing Trust Fund Board (the "Housing Board") is hereby established. The composition, size, term, decision-making authority and other organizational features of the Housing Board shall be as determined by resolution of the council. To the extent permitted by law and determined by resolutions of the council and Napa County Board of Supervisors, the Housing Board shall be an advisory joint City/County Housing Board with final funding decisions made by the appropriate legislative body on expenditure of monies from their respective Housing Funds. The Housing Board shall

biannually develop a Housing Assistance Plan Program and Financing Strategy, subject to approval by the council, to further define and prioritize the uses of the monies in the Housing Fund. The Plan shall be consistent with the City's Adopted Consolidated Plan.

D. Purposes and Use of Funds.

1. Monies deposited in the Housing Fund along with any interest earnings on such monies shall be used solely to increase and improve the supply of housing affordable to households of moderate, low and very low income households; including, but not limited to acquisition of property and property rights, cost of construction including costs associated with planning, administration, and design, as well as actual building or installation, as well as any other costs associated with the construction or financing of affordable housing; reimbursement to the City for such costs if funds were advanced by the City from other sources; and reimbursement of developers or property owners who have been required or permitted to install facilities which are beyond that which can be attributed to a specific development. To the maximum extent possible, all monies should be used to provide for additional affordable housing and services. Monies may also be used to cover reasonable administrative expenses not reimbursed through processing fees, including reasonable consultant and legal expenses related to the establishment and/or administration of the Housing Fund and reasonable expenses for administering the process of calculating, collecting, and accounting for inclusionary fees and any deferred City fees authorized by this section. No portion of the Housing Fund may be diverted to other purposes by way of loan or otherwise.

2. Monies in the Housing Fund shall be used in accordance with the priorities identified by the Housing Assistance Plan Program and Financing Strategy to construct, acquire, rehabilitate or subsidize very low, low and moderate

income housing and/or to assist other governmental entities, private organizations or individuals in the construction, rehabilitation, reimbursement of City advanced funds, reimbursement of developer supplied infrastructure capacity, location or subsidy of very low, low and moderate income housing. To the extent possible as determined by the Council, monies shall be targeted to benefit households at or below 60% of Median Income in Napa County. Monies in the Housing Fund may be disbursed, hypothecated, collateralized or otherwise employed for these purposes from time to time as the housing director and City council determine is appropriate to accomplish the purposes of the Housing Fund. These uses include, but are not limited to, assistance to housing development corporations, equity participation loans, grants, pre-home ownership co-investment, pre-development loan funds, participation leases, or other public/private partnership arrangements. The Housing Fund monies may be extended for the benefit of rental or owner occupied housing or housing services.

3. Expenditures by the housing director from the Housing Fund shall be controlled, authorized and paid in accordance with general city budgetary policies. Execution of contracts related to the use or administration of Housing Fund monies shall be in accordance with standard council policy.

E. Location of Housing Units and Housing Services to be Assisted With Housing Fund Monies.

1. The Housing Board shall develop, for council approval, criteria for the location of the housing units to be assisted with Housing Fund monies. One of the purposes of these criteria shall be to help ensure that Housing Fund monies are used to assist the city in meeting its fair share housing goals as set forth in the Housing Element of the City of Napa General Plan.

2. With respect to monies generated by the Housing impact Fee established by Section 15.94.050, these criteria shall

also consider a reasonable geographical linkage between the non-residential development projects subject to such fee and the housing assistance provided with the Housing Fund monies collected in connection with such projects, such that those receiving the housing assistance could reasonably commute to the commercial locations.

15.94.040 Non-Residential Development Project Housing Impact Fee.

A. Application.

A Housing Impact Fee is hereby imposed on all developers of non-residential development projects. Notwithstanding the foregoing, this fee shall not apply to developers of non-residential projects which fall within one or more of the following categories:

1. Projects that are the subject of development agreements currently in effect with the city, approved prior to the effective date of this chapter where such agreements expressly preclude the city from requiring compliance with this type of housing fee program; or

2. The non-residential uses are set forth either in a building permit application accepted as complete by the city prior to 5:00 p.m. on January 5, 1999, or in a use permit or similar discretionary approval approved prior to 5:00 p.m. on January 5, 1999; however any extension or modification of such approval or permit after such date shall not be exempt; or

3. That portion of a project located on property owned by the State of California, the United States of America or any of its agencies used exclusively for governmental or educational purposes; or

4. A project to the extent it has received a vested right to proceed without payment of housing impact fees pursuant to state law; or

5. Projects operated by nonprofit organizations which provide food storage, meal service and/or temporary shelter to the homeless; or

6. Projects for which no nexus can be established; or

7. Projects for uses labeled "Exempt" in Table 2 of this Section; or

8. Any building which is damaged or destroyed by fire or natural catastrophes so long as the square footage of the building remains the same.

B. Payment of fee.

Unless otherwise preempted by law the Housing Impact Fee shall be paid prior to the issuance of a building permit; or upon execution by the developer and owner, if different, of the city's secured building agreement recorded against the property, at the time of final inspection/Certificate of Occupancy. The housing director is hereby authorized to execute such agreements on behalf of the city.

C. Calculation of Housing Impact Fee.

1. The Housing Impact Fee for non-residential development projects shall be charged on a per square foot basis for all new gross floor area, including all additions where floor area is increased, with a specific per square foot amount set for each nonresidential use type identified in Table 1 below. The amount and calculation for each such fee shall be established by resolution of the City Council. Gross floor area is determined by calculating the combined area for all floors in accordance with the definition of "Gross square feet floor area" contained in Section 15.94.020. If the non-residential development project is in whole or part a replacement for space previously on the site, but demolished within one year prior to the filing of the application for the new construction or remodel, credit shall be

given for the space demolished or to be demolished at the rate applicable to the prior use of that space.

TABLE 1

HOUSING IMPACT FEE REQUIREMENT

Type of Use
Office
Hotel
Retail
Industrial
Warehouse (30,000 to 100,000 square feet)*
Warehouse (over 100,000 square feet)
Wine Production

**Warehouse uses of under 30,000 square feet shall be treated as industrial uses.*

2. In calculating the fee, the chief building official shall use those fees of Table 1 and Table 2 in effect by resolution of the City Council at the time of the issuance of the building permit or if no building permit is required, at the time of issuance of a use or other discretionary permit. In the case of large, mixed-use development projects involving the simultaneous construction of different structures and/or different uses, the categories in Table 2 and the types of uses in Table 1 may be used to create a mixed fee to be collected for all uses in the project. In that case, the fee shall be designed to approximate the revenue which would have been collected had the appropriate type of use category in Table 1 been applied to each individual portion of the project.

3. The type of use subject to the Housing Impact Fee will be determined in the following situations based on a case-by-case calculation of employee density:

a. In the case of uses listed as "Special" in Table 2.

b. In the case of a use which does not fall into one of the uses listed in Table 2 and the housing director determines that (i) the building size is an inappropriate indicator of employee density, or (ii) insufficient generalized information is available to permit a determination that the use falls within one of the use categories listed in Table 2. In the case of uses involving one or fewer employees, which uses shall be exempt from the fee requirement.

c. Upon the remodeling of the building to add additional square footage, the appropriate Housing Impact Fee shall be paid only on the additional square footage.

4. The housing director's determination of employee density pursuant to subsection 3 shall be based on: data concerning anticipated employee density for the project submitted by the applicant; employment surveys or other research on similar uses submitted by the applicant or independently researched by the housing director; or any other data or information the housing director determines relevant. Any application for a non-residential development project where a special fee determination is requested shall be accompanied by information sufficient to enable the housing director to make a determination of employee density pursuant to this subsection.

TABLE 2

NON-RESIDENTIAL LAND USE MATRIX WITH SPECIAL CATEGORICAL FEE DETERMINATIONS AND EXEMPTIONS

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
A. Hotels, Motels and bed-and-breakfast inns					X			
B. Commercial Uses General retail and personal service uses including integrated commercial centers.		X						
Furniture, appliance, household equipment; office equipment and sales, service and repair of bulk goods		X						

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Service commercial and heavy commercial uses (building materials, contractor yard, tool rental, bus terminals, print shops, auto parts shops, janitorial services, etc.				X				
Gas station, service/auto repair including paint and auto body shops.		X						
Eating and drinking establish-ments.		X						
Commercial amusement and recreation uses.							X	
Commercial plant nurseries.				X				
C. Office Uses Banking, savings and loan associations; pro-fessional, business and administrative offices.	X							

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Medical/dental offices and clinics.	X							
Industrial/ Wholesale Uses; self-storage uses.			X					
Wholesale and warehouse uses.			X					
General industrial uses.				X				
Research, development and testing uses.				X				
D. Industrial Uses Public and private elementary schools (grades K-8)								X
Public and private secondary schools								X
Public and private college/university								X
Technical and adult education (business, beauty, barber, trade, technical, vocational and other similar uses).		X						

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Hospitals							X	
Nursery Schools and daycare facility serving even or more children		X						
Public libraries, art galleries, museums and other non-recreational public facilities.								X
E. Assembly Uses Churches.								X
Funeral homes.		X						
Auditoriums.							X	
Theaters.		X						
Sports Arenas.							X	
F. Wine Uses Wine production.						X		
Wine storage.			X					
Wine tank and crush pads.			X					
Wine visitor centers.						X		

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
G. Unlisted Uses							X	
H. Exempt or Special Fee Users Agricultural uses.								X
Child care center with six or fewer children.								X
Christmas tree sales lot.								X
Fuel yard.							X	
Golf course.							X	
Marinas.							X	
Nonprofit organization–food preparation for off-site consumption.								X
Nonprofit organization–food storage and distribution.								X
Nonprofit organization–meal service facility.								X
Public parking lot.								X
Public utility yard.								X

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Railroad yard or shop.							X	
Residential care facility–nonprofit.							X	
Residential care facility–private.							X	
Schools–nonprofit.								X
Wholesale stores and distribution.							X	

D. Alternative to Payment of Housing Impact Fee.

As an alternative to payment of the Housing Impact Fee, a developer of a nonresidential development project may submit a request to mitigate the impacts of such development through the construction of residential units, the dedication of land, or mixed use or other resources. Such requests shall be approved by the city council, if the city council determines that such alternative will further affordable housing opportunities in the city to an equal or greater extent than payment of the Housing Impact Fee.

E. Processing Requirements.

1. Each discretionary permit for a project subject to this section shall contain an express condition requiring compliance with this section.

2. No application for building permits or discretionary permits for any project subject to this section shall be deemed

complete unless the application contains (a) a statement of the number of gross square feet in a non-residential development project to be constructed, added, or placed that are subject to the requirements of this section, together with documentation sufficient to support the application; (b) the intended use or uses for the non-residential development project by gross square feet; and (c) a statement of any exemptions applicable to the project.

3. The housing director may require similar information for completeness of other city permits or licenses as necessary or convenient to implement this section.

F. Phase-in Requirements.

Notwithstanding any other provision of this section, any Housing Impact Fee imposed pursuant to this section in connection with a building permit issued for a project approved by use permit or similar discretionary approval between January 6, 1999, and January 5, 2000, shall be reduced by 50% of the amount set by city council resolution and payment of this reduced fee shall constitute full compliance.

15.94.050 Residential development project: Inclusionary/in-lieu fee requirements.

A. Inclusionary requirement.

At least 10% of all new dwelling units in a residential development project shall be affordable units which shall be constructed and completed not later than the related market rate units. For fractions of affordable units, including fractions resulting from construction of less than ten dwelling units, the developer may elect, at his or her option, to construct the next higher whole number of affordable units, perform an equivalency action alternative which has received the approval of council pursuant to subsection B hereof, or pay the In-lieu fee specified in subsection D for such fraction. Notwithstanding

the above, this section shall not apply to projects which fall into one or more of the following categories:

1. The construction of a single dwelling unit which is the whole of a residential development project and which is built, owned, and after completion, occupied for two years by a moderate income household verified by the housing director and meets the requirements established by subsection M. For purposes of this exemption, a dwelling unit shall be deemed "built" by its owner if it is built by or for a permit holder who intends to reside in the dwelling unit subject to subsection M hereof; or

2. Projects that are the subject of development agreements currently in effect with the city and approved prior to the effective date of this chapter where such agreements expressly preclude the city from requiring compliance with this type of a housing fee program; or

3. The building permit application for a project for which a use permit and any extensions thereof, was approved prior to January 5, 1999; or

4. A residential development project to the extent it has received a vested right to proceed without payment of housing impact fees pursuant to state law.

5. Building permits for residential development projects if compliance with this section for such project has already been satisfied including, but not limited to, building permits on newly created lots where the subdivider has built affordable units or otherwise satisfied this section.

6. Any dwelling unit which is damaged or destroyed by fire or natural catastrophes so long as the square footage and use of the building remains the same.

7. A building permit application for the first dwelling unit to be constructed on a lot which was legally created prior

to January 5, 1999, or created by the recordation of a final or parcel map which conforms to a previously approved tentative subdivision or parcel map so long as such tentative map and any extensions were approved by the city prior to January 5, 1999.

B. Alternative Equivalent Proposal.

A developer of a single-family residential development project may meet the requirements of subsection A hereof by an alternative equivalent action. A developer of a multi-family residential development project may propose to meet the requirements of subsection A hereof by an alternative equivalent action, subject to the review and approval by the city council. A proposal for an alternative equivalent action may include, but is not limited to, dedication of vacant land, the construction of affordable units on another site or acquisition and enforcement of required rental/sales price restrictions on existing standard dwelling units consistent with this section. Any proposal shall show how the alternative proposed will further affordable housing opportunities in the City to an equal or greater extent than compliance with the express requirements of subsection A or compliance with the express requirements of subsection A or payment of the appropriate in-lieu housing fee. Such proposals for single-family residential developments shall be approved by the city council, if the council determines that such alternative will further affordable housing opportunities in the city to an equal or greater extent than payment of the housing in-lieu fee. Such proposals for multi-family residential developments shall be considered on a case by case basis by the city council and may be approved at the city council's sole discretion, if the city council determines that such alternative will further affordable housing opportunities in the city to an equal or greater extent than compliance with the express requirements of subsection A.

C. In-lieu Housing Fee.

A developer of single family residential development project may meet the requirements of subsection A hereof by payment of an in-lieu fee. A developer of a multi-family residential development may propose to meet the requirements of subsection A hereof by submitting at the time of application for a discretionary or building permit, whichever comes first, a request to pay the in-lieu fee along with a report identifying all overriding conditions impacting the project that prevent developer from meeting the requirement to construct the affordable units; sufficient independent data, including appropriate financial information, that supports the developer's claim that it is not feasible to construct the required affordable units and a detailed analysis of why the various concessions and incentives identified in subsection F cannot mitigate the developer's identified conditions that are preventing him/her from constructing the affordable units. The planning director and the housing director shall review all such requests and prepare a recommendation for the council. Such requests shall be considered on a case-by-case basis by the council and may be approved, at the council's sole discretion, if the council determines that there are overriding conditions impacting the project that prevent developer of a multi-family residential development from meeting the requirement to construct affordable units and that payment of the in-lieu fee will further affordable housing opportunities.

D. Time of Payment of In-lieu Fee.

Unless otherwise preempted by law, the housing in-lieu fee shall be paid prior to the issuance of a building permit, or upon execution by the developer and owner, if different, of the city's secured building agreement recorded against the property, at the time of final inspection/Certificate of Occupancy. The housing director is hereby authorized to execute such agreements on behalf of the city.

E. Calculation of Housing In-lieu Fee.

The housing in-lieu fee shall be charged on a percentage basis of the projected construction costs of market rate dwelling units. The amounts and calculation of the housing in-lieu fee shall be established by resolution of the city council. Construction costs of market rate dwelling units is determined in accordance with the definition in Section 15.94.020 which states "Construction costs shall mean the estimated cost per foot of construction, as established by the building department of the City of Napa for use in the setting of regulatory fees and building permits, multiplied by the total square footage to be constructed for each dwelling unit, minus square footage for garage area." For attached single-family residential and rental residential development projects, construction costs shall be separately calculated for each dwelling unit and the appropriate fee paid for each unit within the residential project. The housing in-lieu fee required by this section may be satisfied either by cash payment or upon the recommendation of the housing director and approval of the city council, by an alternative which will provide city with a value equal to or greater than the amount of the required in-lieu fee.

F. Affordable Housing Concessions or Incentives.

1. For residential development projects which meet the requirements specified in subsection A through the actual construction of affordable units, the city shall follow the procedures described below and provide the described concessions and/or those incentives identified in Chapter 17.84 of the Napa Municipal Code:

a. Within ninety (90) days of submittal by a developer of a written preliminary conceptual development proposal prior to the submittal of any formal application for a general plan amendment, rezoning, use permit, tentative subdivision or parcel map or other permit or entitlement describing and specifying the number, type, location and size of the housing

development, identifying any requests for density bonus, additional incentives, concessions or waivers or modification of development or zoning standards, necessary to make construction feasible for the proposed development, including the affordable units, the city council shall review the preliminary development proposal at a public hearing noticed in accordance with Napa Municipal Code Section 17.06.070(C.) and indicate conceptual approval or disapproval of the proposed development and any requests for additional affordable housing incentives, concessions or waivers or modification of development or zoning standards. Such preliminary approval or disapproval shall not bind the city council but rather shall be subject to the discretion of the city council to modify its preliminary recommendations based upon a full review of all pertinent project information, including any environmental impact report, presented at the public hearing on the application.

b. Applications which include the construction of affordable units shall be processed by all city departments before other residential land use applications regardless of the original submittal date. Applications including affordable rental units shall be processed before applications including owner-occupied units.

c. All city-required fees on affordable units shall be deferred for payment until the issuance of the certificate of occupancy.

d. For owner-occupied affordable units, the city through the Housing Authority of the City of Napa shall purchase and assume responsibility for marketing and selling an affordable unit that remains unsold upon the issuance of a certificate of occupancy using trust fund or other available funds. Until the issuance of a certificate of occupancy, the developer is responsible for marketing and selling the affordable units.

2. The city council may consider, on a case-by-case-basis, at its sole discretion the provision of the following additional concessions or incentives identified in Government Code Section 65915 which are consistent with state law and the Housing Element of the City of Napa General Plan for projects which meet or exceed the requirements of Chapter 17.84:

a. An additional density bonus or other incentives of equal financial value subject to the city council's review and approval.

b. Waiver or modification of city standards that have a direct impact on reducing total project costs while being consistent with required Building and Safety Code standards. The developer shall be responsible for documenting that the waiver or modification is necessary for the feasibility of the residential development project and is consistent with required Building and Safety Code Standards.

c. Provision of direct financial assistance in the form of a loan or grant using trust fund or other appropriate available funds subject to the recommendation of the housing director.

d. Deferral of payment of city fees on market rate units until the issuance of the certificate of occupancy for the unit.

3. The city council may consider, on a case by case basis, at its sole discretion, the provision of additional concessions or incentives consistent with state law and the Housing Element of the City of Napa General Plan for residential development projects which provide at least 15% of the total dwelling units as affordable units.

G. Requirements for Rental Affordable Units.

1. One-half of the affordable units which are required to be constructed in connection with construction of rental market rate units shall be available at affordable rents to very low-income households. The remaining one-half of the required

affordable units shall be available at affordable rents to low-income households. Where the number of required affordable units is an odd number, the number of affordable units constructed for very low-income households may be one less than the number of affordable units construction for low-income households.

2. With respect to any particular rental residential project, the city council may, upon the recommendation of the housing director, forgive all or a portion of the affordability requirement set forth in subsection A above upon a showing by the applicant that imposition of such requirement on the residential project will cause undue hardship and that such residential project will contribute significantly to affordable housing opportunities in the city.

H. Requirements for Owner-occupied Affordable Units.

1. One-half of the affordable units which are required to be constructed in connection with the construction of market rate units intended for owner-occupancy shall be available at affordable sales prices to households whose annual household income does not exceed 100% of median income. If one-half of the affordable units required at an affordable sales price not exceeding one hundred percent (100%) of median income are available at affordable sales prices to households whose annual household income does not exceed eighty percent (80%) of median income, the developer shall be entitled to an additional density bonus of five percent (5%) for the proposed development.

2. As an alternative to receiving an additional density bonus of five percent (5%), a developer may submit a request for another incentive of a financial value equal to the density bonus. Such requests shall be considered on a case-by-case

basis by the city council and shall be approved, at the city council's sole discretion, if the city council determines that such alternative incentive will further affordable housing opportunities.

3. The remaining one-half of the required affordable units shall be available at affordable sales prices to moderate income households. Where the number of required affordable units is an odd number, the number of units affordable to moderate income households may be one greater than the number affordable at or below 100% of median income.

I. Basic Requirements for Owner-Occupied and Rental Affordable Units.

Affordable units shall be comparable in number of bedrooms, exterior appearance and overall quality of construction to market rate units in the same residential project. Subject to the approval of the planning director and housing director, square footage of affordable units and interior features in affordable units may not be the same as or equivalent to those in market rate units in the same residential project, so long as they are of good quality and are consistent with contemporary standards for new housing. Affordable units shall be dispersed throughout the residential project, or, subject to the approval of the planning director and housing director, may be clustered within the residential project when this furthers affordable housing opportunities.

J. Continued Affordability.

1. Prior to the issuance of certificates of occupancy or approval of the final inspection for affordable units, regulatory agreements and, if the affordable units are owner-occupied, resale restrictions, deeds of trust and/or other documents, all of which must be acceptable to the housing director and consistent with the requirements of this chapter, shall be recorded against parcels having such affordable units and shall be effective for

a minimum of 30 years with respect to each owner-occupied affordable unit and in perpetuity for rental affordable units.

2. Notwithstanding any other provision in this Section: (a) The maximum sales price permitted on resale of an affordable unit intended for owner-occupancy shall not exceed the seller's purchase price, adjusted for the percentage increase in median income since the seller's purchase, plus the value of substantial structural or permanent fixed improvements to the property, plus the cost of reasonable seller's broker fee as determined by the housing director. For purposes of this subparagraph, median income shall be calculated based upon the presumed occupancy levels used to determine affordable sales price. (b) the resale restrictions shall provide that in the event of the sale of an affordable unit intended for owner-occupancy, the city shall have the right to purchase or assign its right to purchase such affordable unit at the maximum price which could be charged to an eligible household.

3. No household shall be permitted to occupy an affordable Unit, or purchase an affordable unit for owner-occupancy, unless the city or its designee has approved the household's eligibility, or has failed to make a determination of eligibility within the time or other limits provided by a regulatory agreement or resale restrictions, if the city or its designee maintains a list of eligible households, households selected to occupy affordable units shall be selected first from that list to the extent provided in the regulatory agreement or resale restrictions.

K. Annual Monitoring and Transfer Fees.

1. For each rental affordable unit provided hereunder, the current owner may be required to pay an annual monitoring fee for the term of required affordability. Such fee shall be specified in the regulatory agreement(s) required hereunder.

2. For each owner-occupied affordable unit provided under this section, the current owner may be required to pay a transfer fee for any change of ownership during the term of required affordability. Such fee shall be specified in the resale restrictions required by subsection J.

L. Discretionary Permit Requirements.

Every discretionary permit for a residential development project approved after the effective date of this chapter shall contain a condition detailing the method of compliance with this chapter. Every final and parcel map shall bear a note indicating whether compliance with the requirements of this section must be met prior to issuance of a building permit for each lot created by such map.

M. Requirements for Certificate of Occupancy/Final Inspection.

1. No temporary or permanent certificate of occupancy shall be issued, final inspection approved or release of utilities authorized for any new dwelling unit in a residential development project until the developer has satisfactorily completed the requirements hereunder, i.e., on-site construction of affordable units, alternative equivalent action(s) or payment of the housing in-lieu fee.

2. No temporary or permanent certificate of occupancy shall be issued, final inspection approved or release of utilities authorized for a dwelling unit described in subsection A(1) above until the developer has made a showing acceptable to the housing director that such an exemption is appropriate. The housing director shall develop and implement regulations designed to ensure that such initially exempt dwelling units remain in compliance with the terms of the exemption throughout the first two years of occupancy. A developer of a dwelling unit found to be out of compliance at any time during

such two-year period shall be required to pay 125% of the then current in-lieu fee for that dwelling unit, as specified by resolution of the city council. Such payment, however, shall not limit the city's ability to proceed against any party pursuant to Section 15.94.060 or other applicable law.

N. Phase-in Requirements.

Notwithstanding any other provision of this section, any housing in-lieu fee or inclusionary requirement imposed pursuant to this section in connection with a building permit or license issued for a project approved between January 6, 1999, and January 5, 2000, shall be reduced by 50% of the amount set by city council resolution, and payment of this reduced fee or meeting 50% of the inclusionary requirement of subsection A shall constitute full compliance.

15.94.060 Enforcement provisions.

A. It shall be unlawful, a public nuisance and a misdemeanor for any person to sell or rent an affordable unit at a price or rent exceeding the maximum allowed under this chapter or to a household not qualified under this chapter, and such person shall be subject to a $500.00 fine per month from the date of original non-compliance until the affordable unit is in compliance with this section.

B. The Napa City Attorney's Office or the Napa County District Attorney, as appropriate, shall be authorized to abate violations of this chapter and to enforce the provisions of this chapter and all implementing regulatory agreements and resale controls placed on affordable units by civil action, injunctive relief, and any other proceeding or method permitted by law.

C. The remedies provided for herein shall be commulative and not exclusive and shall not preclude the city from any other remedy or relief to which it otherwise would be entitled under law or equity.

15.94.070 Annual review.

The Housing Impact Fee, Housing In-lieu Fee and inclusionary requirements authorized by this chapter and implementing resolution(s) shall be reviewed annually by the city council.

15.94.080 Adjustment.

A. A developer of any project subject to the requirements in this chapter may appeal to the city council for a reduction, adjustment, or waiver of the requirements based upon the absence of any reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement.

B. A developer subject to the requirements of this chapter who has received an approved tentative subdivision or parcel map, use permit or similar discretionary approval and who submits a new or revised tentative subdivision or parcel map, use permit or similar discretionary approval for the same property may appeal for a reduction, adjustment or waiver of the requirements with respect to the number of lots or square footage of construction previously approved.

C. Any such appeal shall be made in writing and filed with the city clerk not later than ten (10) days before the first public hearing on any discretionary approval or permit for the development, or if no such discretionary approval or permit is required, or if the action complained of occurs after the first public hearing on such permit or approval, then the appeal shall be filed within ten (10) days after payment of the fees objected to. The appeal shall set forth in detail the factual and legal basis for the claim of waiver, reduction, or adjustment. The city council shall consider the appeal at the public hearing on the permit application or at a separate hearing within sixty (60) days after the filing of the appeal, whichever is later. The appellant shall bear the burden of presenting substantial

evidence to support the appeal including comparable technical information to support appellant's position. No waiver shall be approved by the city council for a new tentative subdivision or parcel map, user permit or similar discretionary approval on property with an approved tentative subdivision or parcel map, use permit or similar discretionary permit unless the council finds that the new tentative subdivision or parcel map, user permit or similar discretionary approval is superior to the approved project both in its design and its mitigation of environmental impacts. The decision of the council shall be final. If a reduction, adjustment, or waiver is granted, any change in use within the project shall invalidate the waiver, adjustment, or reduction of the fee or inclusionary requirement

Section 4. This Ordinance shall expire on January 5, 2009, unless a later enacted Ordinance enacted before January 5, 2009 deletes or extends this date.

Section 5. The City Council finds that there are now several proposed residential and non-residential development projects in various stages before the City. The Council finds that the funds from a Housing Impact Fee, Housing In-lieu Fee, and inclusionary requirements are necessary to mitigate the immediate additional demand for more affordable housing created by these development projects and to assure implementation of the City's General Plan and Housing Element. Without the proposed fees and inclusionary requirements, the City would not be able to retain a balanced community with housing opportunities available to low and moderate income households in the City. The City Council hereby determines that such demand for additional affordable housing caused by proposed new development projects requires that this ordinance become effective immediately.

Section 6. This urgency ordinance shall take effect immediately upon the date of its adoption, and prior to the expiration of fifteen (15) days from the passage thereof shall be published

at least once in the Napa Valley Register, a newspaper of general circulation, published and circulated in the City of Napa and thenceforth and thereafter the same shall be in full force and effect.

Section 7. Because of the urgency of this ordinance, to the extent any other substantive or procedural requirements may otherwise apply or be imposed pursuant to the Napa Municipal Code or any other ordinance or resolution, including but not limited to notice requirements and requirements of the Planning Commission review and interim ordinance requirements under Napa Municipal Code Section 17.08.080, such requirements are hereby waived and deemed inapplicable to the adoption of this urgency ordinance.

Section 8. If any section, sub-section, subdivision, paragraph, clause or phrase in this ordinance or any part thereof, is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining sections or portions of this ordinance or any part thereof. The City Council hereby declares that it would have passed each section, sub-section, subdivision, paragraph, sentence, clause or phrase of this ordinance, irrespective of the fact that any one or more sections, sub-sections, subdivisions, paragraphs, sentences, clauses or phrases may be declared invalid or unconstitutional.

MAYOR

/s/ Ed Henderson

ATTEST:

/s/ Pamyla Nigliazzo
City Clerk

STATE OF CALIFORNIA)
COUNTY OF NAPA) SS:
CITY OF NAPA)

I, Pamyla Nigliazzo, City Clerk of the City of Napa, do hereby certify that the foregoing urgency ordinance was adopted on July 6, 1999, by the following vote:

AYES: Sercu, Techel, Busenbark, Martin and Henderson

NOES: None

ABSENT: None

ATTEST: /s/ Pamyla Nigliazzo
City Clerk
of the City of Napa

Appendix G–1

ORDINANCE O1999/20

AN ORDINANCE OF THE CITY OF NAPA, COUNTY OF NAPA, STATE OF CALIFORNIA, ADDING CHAPTER 15.94 TO THE NAPA MUNICIPAL CODE CREATING AND ESTABLISHING A HOUSING TRUST FUND, A HOUSING IMPACT FEE ON NON-RESIDENTIAL DEVELOPMENT AND ESTABLISHING AN INCLUSIONARY IN-LIEU FEE REQUIREMENT FOR RESIDENTIAL DEVELOPMENT PROJECTS

Be it ordained by the City Council of the City of Napa as follows:

Section 1. With respect to non-residential development, the Council finds as follows:

A. New office, retail, industrial, hotel, warehouse, wine production and other non-residential uses (hereinafter referred to as "non-residential uses" or "non-residential development projects") in the City of Napa ("City") have been, and continue to be, a major factor in attracting new employees to the region. A number of these employees and their families reside, or will reside, in the City of Napa. These new employees and their families create a need for additional housing in the City of Napa.

B. Traditionally these non-residential uses have benefited from a supply of housing for their employees available at competitive prices and locations close to the place of employment. However, in recent years, the supply of housing has not kept pace with the demand for housing created by these new employees and their families. If this shortage were to grow or continue, employers would have increasing difficulty in

locating in or near the City of Napa due to problems associated with attracting a labor force. Employees would be unable to find appropriate housing in the area, and accordingly would be forced to commute long distances. This situation would adversely affect their quality of life, consume limited energy resources, increase congestion on already overcrowded highways and have a negative impact on air quality.

C. The competition for housing is especially acute with respect to households of low income (those households with incomes of 80% or below median income for Napa County). An identifiable portion of the new employees attracted to the City of Napa by new non-residential development will live in low and very low income households and will therefore compete with present residents for scarce affordable housing units in the City. Increasing the production and availability of low income housing is especially problematic. Prices and rents for housing affordable to households of low and very row income remain below the level needed to attract new construction. This is even more true for households of very low income (those with incomes 50% or below median income for Napa County). Federal and State housing finance and subsidy programs are not sufficient by themselves to satisfy the low-income housing requirements associated with this employment.

D. On November 17, 1992, the Council adopted the Housing Element of the City of Napa General Plan. The Housing Element calls for the provision of additional housing for all sectors of the population, to accommodate the demands of both existing and new residents attracted to the region by increased employment. The Housing Element also provides that the City should make special efforts to encourage an increased supply of housing affordable to low and very low income households. More specifically, the City of Napa within its Housing Element, committed itself to the establishment of a City Inclusionary Housing Program and an Industry-Housing Linkage Program as key elements of its plan to help ensure that

housing will be available for all economic segments, as required by State law.

E. The City, with assistance from the NCCDC Affordable Housing Task Force and the Jobs-Housing Nexus Study Advisory Committee, studied housing needs throughout all jurisdictions, and the financial mechanisms available to address those needs, in Napa County. The resultant City of Napa and Napa County Jobs-Housing Nex s Study, September 1992, updated as of February 16, 1999 ("Nexus Report"), which is hereby incorporated by reference, examined the connection between non-residential development projects and the housing needs of moderate, low and very low income households. The Nexus Report concluded that a clear nexus can be established between the employees of various commercial and industrial buildings or land use types and the number of moderate, low and very low income employee households that are directly associated with such buildings and that will accordingly impact the housing market in and around Napa City: The Nexus Report further quantified the share of this need represented by low and very low income households.

F. Non-residential development brings in new employees, a significant percentage of those employees will live in the City, and that this number yields a certain number of households from which a definable number will be of low or very low income. Adjustments may be made to this number of households to take into account household size, multiple earner households, previously housed employees, etc., to yield the approximate per square foot contribution each employment activity contributes to the net new need for a housing subsidy, Based on the Nexus Report, each additional square foot of office development creates a need for low-income housing assistance in an amount of $17.65; retail development creates a need of $17.10 per square foot; industrial development creates a need of $6.52 per square foot; hotel development creates a need of $10.23 per square foot; warehouse development creates

a need of $2.49 per square foot; and the development of wine production facilities creates a need of $6.52 per square foot.

G. The City housing fee is established to implement the goals and objectives of the City of Napa General Plan, including the Housing Element and related environmental documents, the Napa City General Plan Environmental Impact Report, the NCCDC Affordable Housing Finance Task Force report and recommendations and the Nexus Report, together with the reports appended thereto or referenced therein quantifying the nexus between development and low-income housing need. Further to mitigate the impacts caused by new non-residential development in the city of Napa that is appropriate to impose some of the cost of the increased burden of providing housing for low and very low income households necessitated by such non-residential development directly upon the sponsors of the development. The imposition of a housing impact fee is an appropriate means to accomplish this purpose. However, the Council recognizes that establishing a fee at the upper range of the identified burden could have a negative effect on the City's ability to compete in the regional market for non-residential development projects. Thus, in calculating the amount of the housing impact fee, the Council has carefully weighed other factors in addition to the simple calculation of contribution. These include impact of the fee on construction costs, the need to foster the City's competitive position, special factors and hardships associated with certain types of development, and legal issues. Any increases in such fees in the future should consider these same criteria. In view of the numerous assumptions which must attend any such studies and conclusions, the Council has determined that the fee requirements will be set well below the calculated cost of providing market rate low-income housing to persons attracted to the City by corresponding employment opportunities. Further, in order to reduce the initial impact of these fees on the development

community, the Council has determined to phase the fee program in over time.

H. Most non-residential land uses in the City clearly fall within one of the six basic use types studied in the Nexus Report, and are charged a fee accordingly in this ordinance. In a limited number of situations, the fee must be based on a project-by-project determination due to insufficient information as to the general characteristics as to that type of use or special attributes which make building size an inappropriate indicator of employee density.

I. It is recognized that it is inappropriate to impose this housing fee requirement on certain types of non-residential uses because the fee would violate previous development agreements or other quasi-contractual agreements, or is preempted by state law; or because special characteristics of the use otherwise mitigate the impacts or are in themselves mitigation measures to assist the same low-income population to which this ordinance is addressed or because it can be determined that the use categorically will have few or no employees, thus negating the required nexus.

J. One of the purposes of this ordinance is to establish a feasible means by which developers of non-residential development projects assist in increasing the supply of low and very low income housing. The housing fee requirements contained in this ordinance are designed to create a rational relationship between the amount of housing need created by the employment use and the size of the fee, taking into account the impact of such fee on housing construction costs and economic feasibility.

K. The need to provide safe and sanitary dwelling accommodations to persons of low and moderate income is a matter of Citywide concern and represents a responsibility that should be borne by all sectors of the community. The enactment of a housing fee for non-residential development

only partially addresses the total impacts caused by non-residential developments and is intended as one part of the City's multi- faceted approach to affordable housing problems. Further regulatory changes to encourage the production of low-income housing will also be considered to address the existing and future need.

Section 2. With respect to residential development, the City Council finds and declares as follows:

A. Rental and owner-occupied housing in the City has become more and more expensive over time. Housing costs have gone up faster than incomes for many groups in the community.

B. Many persons who cannot afford housing in the City of Napa work in the City, have grown up or have family ties in the City, already live and work in the City but must move because housing is no longer affordable, or wish to live in the City for other reasons.

C. Federal and State government programs do not provide nearly enough affordable housing or subsidies to satisfy the housing needs of low or moderate income households who want or need housing in the City. Newly constructed housing is available in the City, with rare exceptions, only at prices which low and moderate income households cannot afford to pay. This problem has been exacerbated in the past by the fact that local government has at times failed to take a sufficiently active role in the affordable housing effort.

D. Rising land prices have been a key factor in preventing development of new affordable housing. New market rate housing construction in the City aggravates the existing shortage of affordable housing by absorbing the supply of available residential land. This not only reduces the supply of land for affordable housing but further increases the price of remaining residential land. At the same time, new housing

contributes to the demand for goods and services in the City, increasing local employment at wage levels which often do not permit employees to afford housing in the City.

E. Rising land prices and the resultant lack of affordability of housing for local residents and people working in the City are further exacerbated by the high demand for second homes, luxury homes and housing for new residents who commute to the greater Bay Area to work. The use of limited residential land for these purposes further increases the price of remaining residential land.

F. The desirability of the City as a place for second homes, luxury homes and as a bedroom community for workers in the greater Bay Area labor market results from strong agricultural protection and open space policies resulting in a desirable living environment which in turn makes housing affordability for local residents who work in local industries even more difficult to achieve. The City's General Plan contains policy statements favoring the protection of agriculture and open space in the County and directing housing and other urban uses to the urban areas, through the use of a Rural Urban Limit Line (RUL) to denote limits on urban development. These factors and an observed pattern of substantial remodels and demolition/replacement in agricultural areas are probably related; remodeled and replacement dwellings often eliminate older residential units that can economically provide more affordable housing. High percentages of newly constructed or remodeled homes in the upper end of the housing market further exacerbate the affordable housing problem by creating greater needs for many services typically provided by low-income employees.

G. Because neither the private market nor the public sector has as yet provided the levels of housing affordability necessary for the maintenance of a balanced community, local government must take an active lead to insure an adequate

supply of housing for residents and working people of all income levels.

H. The citizens of the City wish to retain a balanced community, with housing available to low and moderate income households. The City agrees with the established policy of the State of California that each community should make available an adequate supply of housing to persons at all economic levels. The City's use of its police power to regulate housing production in ways designed to achieve such a mix of units in the community is appropriate. As stated above, the Council has adopted the Housing Element of the City of Napa General Plan which supports the provision of additional housing for all sectors of the population, with an emphasis on the increased supply of housing affordable to low and very low income households, and calls for the establishment of an Inclusionary Housing program.

I. A balanced community is only possible if part of the new housing built in the City of Napa is affordable to low and moderate income households. Amending the land use regulations of the City to require builders of new housing to include some housing affordable to low or moderate income households, or to otherwise contribute to the effort to increase the supply of affordable housing in the City, is fair, not only because new development contributes to the shortage of affordable housing, but also because the land use regulations of the City in regard to new housing in the City should be consistent with the community's goal of providing an adequate supply of housing for residents and working people of all income levels. Further in order to mitigate the impacts caused by new residential development in the City of Napa, it is appropriate to impose some of the cost of the increased burden of providing housing for low and very low income household directly upon the sponsors of the development contributing to the shortage of affordable housing.

J. The Council shall encourage the building and availability of affordable housing in the City by providing incentives and reducing the constraints on such development in the community. In this regard, the Council intends to consider such things as the establishment of public/private partnerships and the provision of incentives to the building community as provided by law and in the Housing Element of the City of Napa General Plan.

K. Maintaining the affordability of units constructed under this ordinance best serves the goal of assuring a continuing supply of affordable housing for local residents and people who work in the City of Napa but cannot afford to live here. If affordable units are not restricted so as to continue to be affordable at the time of resale, then such units will become market rate units within a relatively short period of time and, with the limited supply of residential land combined with increasing local land and building costs, the units will not be replaceable.

L. The requirements of this ordinance are minimum requirements. The City reserves the right to require additional measures to further affordable housing to the extent it has authority to do so without respect to this ordinance. As mentioned above, the efforts contained in this ordinance are simply one aspect of the City's developing strategy to address affordable housing needs on a variety of fronts.

M. Pursuant to Government Code Section 65913.2, the City Council has considered the effects of these actions on the City's housing needs as established in the Housing Element of the General Plan.

Section 3. Chapter 15.94 is hereby added to the Napa Municipal Code to read as follows:

Appendix G–10

Chapter 15.94

CITY OF NAPA HOUSING TRUST FUND, HOUSING IMPACT FEE AND INCLUSIONARY/IN LIEU FEE REQUIREMENTS

Sections:

15.94.010 Purpose
15.94.020 Definitions
15.94.030 Housing Trust Fund
15.94.040 Non-residential Development Project Housing Impact Fee
15.94.050 Residential Development Inclusionary/ In-lieu Fee requirements
15.94.060 Enforcement provisions
15.94.070 Annual review
15.94.080 Adjustment

15.94.010 Purpose.

The purpose of this chapter is to establish a Housing Trust Fund, a Housing Impact Fee on developers of non-residential development projects in the City of Napa, and an inclusionary requirement or an in-lieu fee on developers of residential development projects to mitigate the impacts caused by these development projects on the additional demand for more affordable housing and rising land prices for limited supply of available residential land. The fees will be used to defray the costs of providing affordable housing for very low, low, and moderate income households in the City of Napa. The fees and inclusionary requirements required by this chapter do not replace other regulatory, development and processing fees or exactions, funding required pursuant to a development agreement or reimbursement agreement; assessments charged

pursuant to special assessments or benefit assessment district proceedings, etc., unless so specified.

15.94.020 Definitions

As used in this chapter:

A. "Addition" shall mean an extension or increase in floor area of existing development project.

B. "Affordable rent" shall mean monthly rent, including tenant paid utilities allowances as determined by the Housing Director and all fees for housing services, that do not exceed thirty percent (30%) of eighty percent (80%) of area median income for lower income households. For very low- income households affordable rents are monthly rents that do not exceed thirty percent (30%) of fifty percent (50%) of area median income. In the case where the applicant is requesting a density bonus under chapter 17.84 of the Napa Municipal Code or where the applicant is requesting direct financial assistance requiring a different rent, "affordable rent" for lower income households, shall mean monthly rents that do not exceed thirty percent (30%) of sixty percent (60%) of area median income. Affordable rent shall be based on presumed occupancy levels of one person in a studio unit, two persons in a one bedroom unit, three persons in a two bedroom unit, and one additional person for each additional bedroom thereafter.

C. "Affordable sales price" shall mean the maximum purchase price that will be affordable to the specified target income household. A maximum purchase price shall be considered affordable only if each monthly owner-occupied housing payment is equal to or less than one-twelfth of 30% of income for the specified target income household. In setting the affordable sales price, realistic assumptions regarding down payment, mortgage interest rate and term will be so that targeted income families can reasonably qualify. Affordable sales price shall be based upon presumed occupancy levels of

one person in a studio unit, two persons in a one bedroom unit, three persons in a two bedroom unit, and one additional person for each additional bedroom thereafter.

D. "Affordable units" shall mean and be limited to those dwelling units which are required to be rented at affordable rents or purchased at an affordable sales price to specified households as described in Section 15.94.050.

E. "Annual household income" shall mean the combined gross income for all adult persons living in a dwelling unit as calculated for the purpose of the Section 8 program under the United States Housing Act of 1937, as amended, or its successor.

F. "Building permit" shall mean a permit issued pursuant to Chapter 15.08 of Title 15 of the Napa Municipal Code.

G. "Chief building official" shall mean the chief building official of the City of Napa, or the designee of such individual.

H. "City" shall mean the incorporated areas of the City of Napa.

I. "Concession" or "incentive" shall have the same meaning as set forth in Chapter 17.04 of the City of Napa Municipal Code.

J. "Construction costs" shall mean the estimated cost per square foot of construction, as established by the building department of the City of Napa for use in the setting of regulatory fees and building permits, multiplied by the total square footage, minus the garage floor area, to be constructed.

K. "Developer" shall mean every person, firm, or corporation constructing, placing, or creating new non-residential or residential development directly or through

the services of any employee, agent, independent contractor or otherwise.

L. "Discretionary permit" shall mean any permit or license issued by the City of Napa for a project which requires the exercise of judgment or deliberation wherein the City decides to either approve or disapprove a particular activity in accordance with applicable laws, including but not limited to use permits, and the approval or modification of tentative, or tentative parcel maps pursuant to Title 16 of the Napa Municipal Code.

M. "Dwelling unit" shall have the meaning set forth in Chapter 17.04 of the City of Napa Municipal Code.

N. "Gross square feet floor area" means the sum of the gross horizontal floor areas of a building measured from the exterior face of exterior walls, or from the center line of a wall separating two buildings. In cases where no walls exist, the gross horizontal floor area shall be that area covered by the roof excluding two feet on each side of the structure for a standard roof projection. Outside areas used for sales and/or display may also be considered (e.g., plant nurseries, building materials, auto sales, wine production, etc.) when the planning director determines that the use of the outside area significantly contributes to the employee density of the building. For purposes of the requirements of Section 15.94.050, the square footage of any tank or wine crush pad or similar non-walled wine related structure shall be included in the gross square feet of a non-residential development project.

O. "Housing Board" shall mean the Housing Trust Fund Board established pursuant to Section 15.94.030.

P. "Housing director" shall mean the housing director of the Housing Authority of the City of Napa or the designee of such individual.

Q. "Housing Fund" shall mean the City of Napa Affordable Housing Trust Fund established pursuant to Section 15.94.030.

R. "Housing Impact Fee" shall mean the fee established pursuant to Section 15.94.040 for non-residential development projects.

S. "Housing In-lieu Fee" shall mean the fee established pursuant to Section 15.94.050 for residential development projects.

T. "Low-income households" are those households with incomes of up to 80% of median income.

U. "Market rate units" shall mean dwelling units in a residential project which are not affordable units.

V. "Median income" shall mean the median income, adjusted for family size, applicable to Napa County as published annually pursuant to Title 25 of the California Code of Regulations, Section 6932 (or its successor provision) by the United States Department of Housing and Urban Development.

W. "Moderate income households" are those households with incomes of up to 120% of median income.

X. "Monthly owner-occupied housing payment" shall be that sum equal to the principal, interest, property taxes, homeowner's insurance and homeowner's association dues paid on an annual basis divided by 12.

Y. "Non-residential development project" shall mean a project for the construction, addition, or placement of a structure which is for non-residential in such land use categories such as commercial, office industrial, etc. and shall include that portion of a mixed or combined use project which includes the construction, addition or placement of a structure for non-residential use in such land use categories.

Z. "Planning director" shall mean the director of the City of Napa planning department or the designee of such individual.

AA. "Residential development project" shall mean a project for the construction or placement of any dwelling unit in a permanent location, or the subdivision of land which is planned, designed, or used for the following land use categories:

1. Single-family residential: This category consists of single-family detached units and duplexes.

2. Multi-family residential: This category consists of buildings containing three (3) or more dwelling units and mobile home parks.

BB. "Very low-income households" are those households with incomes of up to 50% of median income.

15.94.030 Housing Trust Fund.

A. There is hereby established the City of Napa Affordable Housing Trust Fund (the "Housing Fund"). Separate accounts within such Housing Fund may be created from time to time to avoid commingling as required by law or as deemed appropriate to further the purposes of the Fund.

B. The Housing Fund shall be administered by the Housing Director who shall have the authority to govern the Housing Fund consistent with this chapter, and to prescribe procedures for said purpose subject to approval by the Council.

C. A Housing Trust Fund Board (the "Housing Board") is hereby established. The composition, size, term, decision-making authority and other organizational features of the Housing Board shall be as determined by resolution of the council. To the extent permitted by law and determined by resolutions of the council and Napa County Board of Supervisors, the Housing Board shall be an advisory joint

City/County Housing Board with final funding decisions made by the appropriate legislative body on expenditure of monies from their respective Housing Funds. The Housing Board shall biannually develop a Housing Assistance Plan Program and Financing Strategy, subject to approval by the council, to further define and prioritize the uses of the monies in the Housing Fund. The Plan shall be consistent with the City's Adopted Consolidated Plan.

D. Purposes and Use of Funds.

1. Monies deposited in the Housing Fund along with any interest earnings on such monies shall be used solely to increase and improve the supply of housing affordable to households of moderate, low and very low income households; including, but not limited to acquisition of property and property rights, cost of construction including costs associated with planning, administration, and design, as well as actual building or installation, as well as any other costs associated with the construction or financing of affordable housing; reimbursement to the City for such costs if funds were advanced by the City from other sources; and reimbursement of developers or property owners who have been required or permitted to install facilities which are beyond that which can be attributed to a specific development. To the maximum extent possible, all monies should be used to provide for additional affordable housing and services. Monies may also be used to cover reasonable administrative expenses not reimbursed through processing fees, including reasonable consultant and legal expenses related to the establishment and/or administration of the Housing Fund and reasonable expenses for administering the process of calculating, collecting, and accounting for inclusionary fees and any deferred City fees authorized by this section. No portion of the Housing Fund may be diverted to other purposes by way of loan or otherwise.

2. Monies in the Housing Fund shall be used in accordance with the priorities identified by the Housing Assistance Plan Program and Financing Strategy to construct, acquire, rehabilitate or subsidize very low, low and moderate income housing and/or to assist other governmental entities, private organizations or individuals in the construction, rehabilitation, reimbursement of City advanced funds, reimbursement of developer supplied infrastructure capacity, location or subsidy of very low, low and moderate income housing. To the extent possible as determined by the Council, monies shall be targeted to benefit households at or below 60% of Median Income in Napa County. Monies in the Housing Fund may be disbursed, hypothecated, collateralized or otherwise employed for these purposes from time to time as the housing director and city council determine is appropriate to accomplish the purposes of the Housing Fund. These uses include, but are not limited to, assistance to housing development corporations, equity participation loans, grants, pre-home ownership co-investment, Pre-development loan funds, participation leases, or other public/private partnership arrangements. The Housing Fund monies may be extended for the benefit of rental or owner occupied housing or housing services.

3. Expenditures by the housing director from the Housing Fund shall be controlled, authorized and paid in accordance with general city budgetary policies. Execution of contracts related to the use or administration of Housing Fund monies shall be in accordance with standard council policy.

E. Location of Housing Units and Housing Services to be Assisted With Housing Fund Monies.

1. The Housing Board shall develop, for council approval, criteria for the location of the housing units to be assisted with Housing Fund monies. One of the purposes of these criteria shall be to help ensure that Housing Fund monies are used to assist the city in meeting its fair share housing goals

as set forth in the Housing Element of the City of Napa General Plan.

2. With respect to monies generated by the Housing Impact Fee established by Section 15.94.050, these criteria shall also consider a reasonable geographical linkage between the non-residential development projects subject to such fee and the housing assistance provided with the Housing Fund monies collected in connection with such projects, such that those receiving the housing assistance could reasonably commute to the commercial locations.

15.94.040 Non-Residential Development Project Housing Impact Fee.

A. Application.

A Housing Impact Fee is hereby imposed on all developers of non-residential development projects. Notwithstanding the foregoing, this fee shall not apply to developers of non-residential projects which fall within one or more of the following categories:

1. Projects that are the subject of development agreements currently in effect with the city, approved prior to the effective date of this chapter where such agreements expressly preclude the city from requiring compliance with this type of housing fee program; or

2. The non-residential uses are set forth either in a building permit application accepted as complete by the city prior to 5:00 p.m. on January 5, 1999, or in a use permit or similar discretionary approval approved prior to 5:00 p.m. on January 5, 1999; however any extension or modification of such approval or permit after such date shall not be exempt; or

3. That portion of a project located on property owned by the State of California, the United States of America or any

of its agencies used exclusively for governmental or educational purposes; or

4. A project to the extent it has received a vested right to proceed without payment of housing impact fees pursuant to state law; or

5. Projects operated by nonprofit organizations which provide food storage, meal service and/or temporary shelter to the homeless; or

6. Projects for which no nexus can be established; or

7. Projects for uses labeled "Exempt" in Table 2 of this Section; or

8. Any building which is damaged or destroyed by fire or natural catastrophes so long as the square footage of the building remains the same.

B. Payment of fee.

Unless otherwise preempted by law, the Housing Impact Fee shall be paid prior to the issuance of a building permit; or upon execution by the developer and owner, if different, of the city's secured building agreement recorded against the property, at the time of final inspection/Certificate of Occupancy. The housing director is hereby authorized to execute such agreements on behalf of the city.

C. Calculation of Housing Impact Fee.

1. The Housing Impact Fee for non-residential development projects shall be charged on a per square foot basis for all new gross floor area, including all additions where floor area is increased, with a specific per square foot amount set for each nonresidential use type identified in Table 1 below. The amount and calculation for each such fee shall be established by resolution of the City Council. Gross floor area is determined by calculating the combined area for all floors in

accordance with the definition of "Gross square feet floor area" contained in Section 15.94.020. If the non-residential development project is in whole or part a replacement for space previously on the site, but demolished within one year prior to the filing of the application for the new construction or remodel, credit shall be given for the space demolished or to be demolished at the rate applicable to the prior use of that space.

TABLE 1

HOUSING IMPACT FEE REQUIREMENT

Type of Use

Office
Hotel
Retail
Industrial
Warehouse (30,000 to 100,000 square feet)*
Warehouse (over 100,000 square feet)
Wine Production

**Warehouse uses of under 30,000 square feet shall be treated as industrial uses.*

2. In calculating the fee, the chief building official shall use those fees of Table 1 and Table 2 in effect by resolution of the City Council at the time of the issuance of the building permit or if no building permit is required, at the time of issuance of a use or other discretionary permit. In the case of large, mixed-use development projects involving the simultaneous construction of different structures and/or different uses, the categories in Table 2 and the types of uses in Table 1 may be used to create a mixed fee to be collected for all uses in the project. In that case, the fee shall be designed to approximate the revenue which would have been collected had

the appropriate type of use category in Table 1 been applied to each individual portion of the project.

3. The type of use subject to the Housing Impact Fee will be determined in the following situations based on a case-by-case calculation of employee density:

a. In the case of uses listed as "Special" in Table 2.

b. In the case of a use which does not fall into one of the uses listed in Table 2 and the housing director determines that (i) the building size is an inappropriate indicator of employee density, or (ii) insufficient generalized information is available to permit a determination that the use falls within one of the use categories listed in Table 2. In the case of uses involving one or fewer employees, which uses shall be exempt from the fee requirement.

c. Upon the remodeling of the building to add additional square footage, the appropriate Housing Impact Fee shall be paid only on the additional square footage.

4. The housing director's determination of employee density pursuant to subsection 3 shall be based on: data concerning anticipated employee density for the project submitted by the applicant; employment surveys or other research on similar uses submitted by the applicant or independently researched by the housing director; or any other data or information the housing director determines relevant. Any application for a non-residential development project where a special fee determination is requested shall be accompanied by information sufficient to enable the housing director to make a determination of employee density pursuant to this subsection.

TABLE 2

NON-RESIDENTIAL LAND USE MATRIX WITH SPECIAL CATEGORICAL FEE DETERMINATIONS AND EXEMPTIONS

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
A. Hotels, Motels and bed-and-breakfast inns					X			
B. Commercial Uses General retail and personal service uses including integrated commercial centers.		X						
Furniture, appliance, household equipment; office equipment and sales, service and repair of bulk goods.		X						

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Service commercial and heavy commercial uses (building materials, contractor yard, tool rental bus terminals, print shops, auto parts shops, janitorial services, etc.).				X				
Gas station, service/auto repair including paint and auto body shops.		X						
Eating and drinking establishments.		X						
Commercial amusement and recreation uses.							X	
Commercial plant nurseries.				X				

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
C. Office Uses Banking, savings and loans associations; professional, business and administrative offices.	X							
Medical/dental offices and clinics.	X							
Industrial/ Wholesale Uses; self-storage uses.			X					
Wholesale and warehouse uses.			X					
General industrial uses.				X				
Research, development and testing uses.				X				
D. Industrial Uses Public and private elementary schools (grades K-8).								X
Public and private secondary schools.								X

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Public and private college/university.								X
Technical and adult education (business, beauty, barber, trade, technical, vocational and other similar uses).		X						
Hospitals.							X	
Nursery Schools and daycare facility serving even or more children.		X						
Public libraries, art galleries, museums and other non-recreational public facilities.								X
E. Assembly Uses Churches.								X
Funeral homes.		X						
Auditoriums.							X	
Theaters.		X						
Sports arenas.							X	
F. Wine Uses Wine production.						X		

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Wine storage.			X					
Wine tank and crush pads.			X					
Wine visitor centers.						X		
G. Unlisted Uses							X	
H. Exempt or Special Fee Users Agricultural uses.								X
Child care center with six or fewer children								X
Christmas tree sales lot.								X
Fuel yard.							X	
Golf Course.							X	
Marinas.							X	
Nonprofit organization–food preparation of off-site consumption.								X

Non-Residential Use	Office	Retail	Warehouse	Industrial	Hotel/ Motel	Wine	Special Fee	Exempt
Nonprofit organization–food storage and distribution.								X
Nonprofit organization–meal service facility.								X
Public parking lot.								X
Public utility yard.								X
Railroad yard or shop.							X	
Residential care facility–nonprofit.							X	
Residential care facility–private.							X	
Schools–nonprofit.								X
Wholesale stores and distribution.							X	

D. Alternative to Payment of Housing Impact Fee.

As an alternative to payment of the Housing Impact Fee, a developer of a nonresidential development project may submit a request to mitigate the impacts of such development through the construction of residential units, the dedication of land, or mixed use or other resources. Such requests shall be approved by the city council, if the city council determines that such alternative will further affordable housing opportunities in the

city to an equal or greater extent than payment of the Housing Impact Fee.

E. Processing Requirements.

1. Each discretionary permit for a project subject to this section shall contain an express condition requiring compliance with this section.

2. No application for building permits or discretionary permits for any project subject to this section shall be deemed complete unless the application contains (a) a statement of the number of gross square feet in a non-residential development project to be constructed, added, or placed that are subject to the requirements of this section, together with documentation sufficient to support the application; (b) the intended use or uses for the non-residential development project by gross square feet; and (c) a statement of any exemptions applicable to the project.

3. The housing director may require similar information for completeness of other city permits or licenses as necessary or convenient to implement this section.

F. Phase-in Requirements.

Notwithstanding any other provision of this section, any Housing Impact Fee imposed pursuant to this section in connection with a building permit issued for a project approved by use permit or similar discretionary approval between January 6, 1999, and January 5, 2000, shall be reduced by 50% of the amount set by city council resolution and payment of this reduced fee shall constitute full compliance.

15.94.050 Residential development project: Inclusionary/in-lieu fee requirements.

A. Inclusionary requirement.

At least 10% of all new dwelling units in a residential development project shall be affordable units which shall be constructed and completed not later than the related market rate units. For fractions of affordable units, including fractions resulting from construction of less than ten dwelling units, the developer may elect, at his or her option, to construct the next higher whole number of affordable units, perform an equivalency action alternative which has received the approval of council pursuant to subsection B hereof, or pay the In-lieu fee specified in subsection D for such fraction. Notwithstanding the above, this section shall not apply to projects which fall into one or more of the following categories:

1. The construction of a single dwelling unit which is the whole of a residential development project and which is built, owned, and after completion, occupied for two years by a moderate income household verified by the housing director and meets the requirements established by subsection M. For purposes of this exemption, a dwelling unit shall be deemed "built" by its owner if it is built by or for a permit holder who intends to reside in the dwelling unit subject to subsection M hereof; or

2. Projects that are the subject of development agreements currently in effect with the city and approved prior to the effective date of this chapter where such agreements expressly preclude the city from requiring compliance with this type of a housing fee program; or

3. The building permit application for a project for which a use permit and any extensions thereof, was approved prior to January 5, 1999; or

4. A residential development project to the extent it has received a vested right to proceed without payment of housing impact fees pursuant to state law.

5. Building permits for residential development projects if compliance with this section for such project has already been satisfied including, but not limited to, building permits on newly created lots where the subdivider has built affordable units or otherwise satisfied this section.

6. Any dwelling unit which is damaged or destroyed by fire or natural catastrophes so long as the square footage and use of the building remains the same.

7. A building permit application for the first dwelling unit to be constructed on a lot which was legally created prior to January 5, 1999, or created by the recordation of a final or parcel map which conforms to a previously approved tentative subdivision or parcel map so long as such tentative map and any extensions were approved by the city prior to January 5, 1999.

B. Alternative Equivalent Proposal.

A developer of a single-family residential development project may meet the requirements of subsection A hereof by an alternative equivalent action. A developer of a multi-family residential development project may propose to meet the requirements of subsection A hereof by an alternative equivalent action, subject to the review and approval by the city council. A proposal for an alternative equivalent action may include, but is not limited to, dedication of vacant land, the construction of affordable units on another site or acquisition and enforcement of required rental/sales price restrictions on existing standard dwelling units consistent with this section. Any proposal shall show how the alternative proposed will further affordable housing opportunities in the City to an equal or greater extent than compliance with the express requirements of subsection A or compliance with the express requirements of

subsection A or payment of the appropriate in-lieu housing fee. Such proposals for single-family residential developments shall be approved by the city council, if the council determines that such alternative will further affordable housing opportunities in the city to an equal or greater extent than payment of the housing in-lieu fee. Such proposals for multi-family residential developments shall be considered on a case by case basis by the city council and may be approved at the city council's sole discretion, if the city council determines that such alternative will further affordable housing opportunities in the city to an equal or greater extent than compliance with the express requirements of subsection A.

C. In-lieu Housing Fee.

A developer of single family residential development project may meet the requirements of subsection A hereof by payment of an in-lieu fee. A developer of a multi-family residential development may propose to meet the requirements of subsection A. hereof by submitting at the time of application for a discretionary or building permit, whichever comes first, a request to pay the in-lieu fee along with a report identifying all overriding conditions impacting the project that prevent developer from meeting the requirement to construct the affordable units; sufficient independent data, including appropriate financial information, that supports the developer's claim that it is not feasible to construct the required affordable units and a detailed analysis of why the various concessions and incentives identified in subsection F cannot mitigate the developer's identified conditions that are preventing him/her from constructing the affordable units. The planning director and the housing director shall review all such requests and prepare a recommendation for the council. Such requests shall be considered on a case-by-case basis by the council and may be approved, at the council's sole discretion, if the council determines that there are overriding conditions impacting the project that prevent developer of a multi-family residential

development from meeting the requirement to construct affordable units and that payment of the in-lieu fee will further affordable housing opportunities.

D. Time of Payment of In-lieu Fee.

Unless otherwise preempted by law, the housing in-lieu fee shall be paid prior to the issuance of a building permit, or upon execution by the developer and owner, if different, of the city's secured building agreement recorded against the property, at the time of final inspection/Certificate of Occupancy. The housing director is hereby authorized to execute such agreements on behalf of the city.

E. Calculation of Housing In-lieu Fee.

The housing in-lieu fee shall be charged on a percentage basis of the projected construction costs of market rate dwelling units. The amounts and calculation of the housing in-lieu fee shall be established by resolution of the city council. Construction costs of market rate dwelling units is determined in accordance with the definition in Section 15.94.020 which states "Construction costs shall mean the estimated cost per foot of construction, as established by the building department of the City of Napa for use in the setting of regulatory fees and building permits, multiplied by the total square footage to be constructed for each dwelling unit, minus square footage for garage area." For attached single-family residential and rental residential development projects, construction costs shall be separately calculated for each dwelling unit and the appropriate fee paid for each unit within the residential project. The housing in-lieu fee required by this section may be satisfied either by cash payment or upon the recommendation of the housing director and approval of the city council, by an alternative which will provide city with a value equal to or greater than the amount of the required in-lieu fee.

F. Affordable Housing Concessions or Incentives.

1. For residential development projects which meet the requirements specified in subsection A through the actual construction of affordable units, the city shall follow the procedures described below and provide the described concessions and/or those incentives identified in Chapter 17.84 of the Napa Municipal Code:

a. Within ninety (90) days of submittal by a developer of a written preliminary conceptual development proposal prior to the submittal of any formal application for a general plan amendment, rezoning, use permit, tentative subdivision or parcel map or other permit or entitlement describing and specifying the number, type, location and size of the housing development, identifying any requests for density bonus, additional incentives, concessions or waivers or modification of development or zoning standards, necessary to make construction feasible for the proposed development, including the affordable units, the city council shall review the preliminary development proposal at a public hearing noticed in accordance with Napa Municipal Code Section 17.06.070(C) and indicate conceptual approval or disapproval of the proposed development and any requests for additional affordable housing incentives, concessions or waivers or modification of development or zoning standards. Such preliminary approval or disapproval shall not bind the city council but rather shall be subject to the discretion of the city council to modify its preliminary recommendations based upon a full review of all pertinent project information, including any environmental impact report, presented at the public hearing on the application.

b. Applications which include the construction of affordable units shall be processed by all city departments before other residential land use applications regardless of the original submittal date. Applications including affordable rental

units shall be processed before applications including owner-occupied units.

c. All city-required fees on affordable units shall be deferred for payment until the issuance of the certificate of occupancy.

d. For owner-occupied affordable units, the city through the Housing Authority of the City of Napa shall purchase and assume responsibility for marketing and selling an affordable unit that remains unsold upon the issuance of a certificate of occupancy using trust fund or other available funds. Until the issuance of a certificale of occupancy, the developer is responsible for marketing and selling the affordable units.

2. The city council may consider, on a case-by-case-basis, at its sole discretion the provision of the following additional concessions or incentives, identified in Government Code Section 65915 which are consistent with state law and the Housing Element of the City of Napa General Plan for projects which meet or exceed the requirements of Chapter 17.84:

a. An additional density bonus or other incentives of equal financial value subject to the city council's review and approval.

b. Waiver or modification of city standards that have a direct impact on reducing total project costs while being consistent with required Building and Safety Code standards. The developer shall be responsible for documenting that the waiver or modification is necessary for the feasibility of the residential development project and is consistent with required Building and Safety Code Standards.

c. Provision of direct financial assistance in the form of a loan or grant using trust fund or other appropriate available funds subject to the recommendation of the housing director.

d. Deferral of payment of city fees on market rate units until the issuance of the certificate of occupancy for the unit.

3. The city council may consider, on a case by case basis, at its sole discretion, the provision of additional concessions or incentives consistent with state law and the Housing Element of the City of Napa General Plan for residential development projects which provide at least 15% of the total dwelling units as affordable units.

G. Requirements for Rental Affordable Units.

1. One-half of the affordable units which are required to be constructed in connection with construction of rental market rate units shall be available at affordable rents to very low-income households. The remaining one-half of the required affordable units shall be available at affordable rents to low-income households. Where the number of required affordable units is an odd number, the number of affordable units constructed for very low-income households may be one less than the number of affordable units construction for low-income households.

2. With respect to any particular rental residential project, the city council may, upon the recommendation of the housing director, forgive all or a portion of the affordability requirement set forth in subsection A. above upon a showing by the applicant that imposition of such requirement on the residential project will cause undue hardship and that such residential project will contribute significantly to affordable housing opportunities in the city.

H. Requirements for Owner-occupied Affordable Units.

1. One-half of the affordable units which are required to be constructed in connection with the construction of market rate units intended for owner-occupancy shall be available at affordable sales prices to households whose annual household income does not exceed 100% of median income. If one-half

of the affordable units required at an affordable sales price not exceeding one hundred percent (100%) of median income are available at affordable sales prices to households whose annual household income does not exceed eighty percent (80%) of median income, the developer shall be entitled to an additional density bonus of five percent (5%) for the proposed development.

2. As an alternative to receiving an additional density bonus of five percent (5%), a developer may submit a request for another incentive of a financial value equal to the desnity bonus. Such requests shall be considered on a case-by-case basis by the city council and shall be approved, at the city council's sole discretion, if the city council determines that such alternative incentive will further affordable housing opportunities.

3. The remaining on-half of the required affordable units shall be available at affordable sales prices to moderate income households. Where the number of required affordable units is an odd number, the number of units affordable to moderate income households may be one greater than the number affordable at our below 100% of median income.

I. Basic Requirements for Owner-Occupied and Rental Affordable Units

Affordable units shall be comparable in number of bedrooms, exterior appearance and overall quality of construction to market rate units in the same residential project. Subject to the approval of the planning director and housing director, square footage of affordable units and interior features in affordable units may not be the same as or equivalent to those in market rate units in the same residential project, so long as they are of good quality and are consistent with contemporary standards for new housing. Affordable units shall be dispersed throughout the residential project, or, subject to the approval of the planning director and housing director,

may be clustered within the residential project when this furthers affordable housing opportunities.

J. Continued Affordability.

1. Prior to the issuance of certificates of occupancy or approval of the final inspection for affordable units, regulatory agreements and if the affordable units are owner-occupied, resale restrictions, deeds of trust and/or other documents, all of which must be acceptable to the housing director and consistent with the requirements of this chapter, shall be recorded against parcels having such affordable units and shall be effective for a minimum of 30 years with respect to each owner-occupied affordable unit and in perpetuity for rental affordable units.

2. Notwithstanding any other provision in this Section: (a) The maximum sales price permitted on resale of an affordable unit intended for owner-occupancy shall not exceed the seller's purchase price adjusted for the percentage increase in median income since the seller's purchase, plus the value of substantial structural or permanent fixed improvements to the property, plus the cost of reasonable seller's broker fee as determined by the housing director. For purposes of this subparagraph, median income shall be calculated based upon the presumed occupancy levels used to determine affordable sales price, (b) the resale restrictions shall provide that in the event of the sale of an affordable unit intended for owner-occupancy, the city shall have the right to purchase or assign its right to purchase such affordable unit at the maximum price which could be charged to an eligible household.

3. No household shall be permitted to occupy an affordable unit, or purchase an affordable unit for owner-occupancy, unless the city or its designee has approved the household's eligibility, or has failed to make a determination of eligibility within the time or other limits provided by a regulatory agreement or resale restrictions, if the city or its designee maintains a list of eligible households, households

selected to occupy affordable units shall be selected first from that list to the extent provided in the regulatory agreement or resale restrictions.

K. Annual Monitoring and Transfer Fees.

1. For each rental affordable unit provided hereunder, the current owner may be required to pay an annual monitoring fee for the term of required affordability. Such fee shall be specified in the regulatory agreement(s) required hereunder.

2. For each owner-occupied affordable unit provided under this section, the current owner may be required to pay a transfer fee for any change of ownership during the term of required affordability. Such fee shall be specified in the resale restrictions required by subsection J.

L. Discretionary Permit Requirements.

Every discretionary permit for a residential development project approved after the effective date of this chapter shall contain a condition detailing the method of compliance with this chapter. Every final and parcel map shall bear a note indicating whether compliance with the requirements of this section must be met prior to issuance of a building permit for each lot created by such map.

M. Requirements for Certificate of Occupancy/Final Inspection.

1. No temporary or permanent certificate of occupancy shall be issued, final inspection approved or release of utilities authorized for any new dwelling unit in a residential development project until the developer has satisfactorily completed the requirements hereunder, i.e., on-site construction of affordable units, alternative equivalent action(s) or payment of the housing in-lieu fee.

2. No temporary or permanent certificate of occupancy shall be issued, final inspection approved or release of utilities

authorized for a dwelling unit described in subsection A(1) above until the developer has made a showing acceptable to the housing director that such an exemption is appropriate. The housing director shall develop and implement regulations designed to ensure that such initially exempt dwelling units remain in compliance with the terms of the exemption throughout the first two years of occupancy. A developer of a dwelling unit found to be out of compliance at any time during such two-year period shall be required to pay 125% of the then current in-lieu fee for that dwelling unit, as specified by resolution of the city council. Such payment, however, shall not limit the city's ability to proceed against any party pursuant to Section 15.94.060 or other applicable law.

N. Phase-in Requirements.

Notwithstanding any other provision of this section, any housing in-lieu fee or inclusionary requirement imposed pursuant to this section in connection with a building permit or license issued for a project approved between January 6, 1999, and January 5, 2000, shall be reduced by 50% of the amount set by city council resolution, and payment of this reduced fee or meeting 50% of the inclusionary requirement of subsection A shall constitute full compliance.

15.94.060 Enforcement provisions.

A. It shall be unlawful, a public nuisance and a misdemeanor for any person to sell or rent an affordable unit at a price or rent exceeding the maximum allowed under this chapter or to a household not qualified under this chapter, and such person shall be subject to a $500.00 fine per month from the date of original non-compliance until the affordable unit is in compliance with this section.

B. The Napa City Attorney's Office or the Napa County District Attorney, as appropriate, shall be authorized to abate violations of this chapter and to enforce the provisions of this chapter and all implementing regulatory agreements and resale controls placed on affordable units by civil action, injunctive relief, and any other proceeding or method permitted by law.

C. The remedies provided for herein shall be commutative and not exclusive and shall not preclude the city from any other remedy or relief to which it otherwise would be entitled under law or equity.

15.94.070 Annual review.

The Housing Impact Fee, Housing In-lieu Fee and inclusionary requirements authorized by this chapter and implementing resolution(s) shall be renewed annually by the city council.

15.94.080 Adjustment.

A. A developer of any project subject to the requirements in this chapter may appeal to the city council for a reduction, adjustment, or waiver of the requirements based upon the absence of any reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement.

B. A developer subject to the requirements of this chapter who has received an approved tentative subdivision or parcel map, use permit or similar discretionary approval and who submits a new or revised tentative subdivision or parcel map, use permit or similar discretionary approval for the same property may appeal for a reduction, adjustment or waiver of the requirements with respect to the number of lots or square footage of construction previously approved.

C. Any such appeal shall be made in writing and filed with the city clerk not later than ten (10) days before the first public hearing on any discretionary approval or permit for the development, or if no such discretionary approval or permit is required, or if the action complained of occurs after the first public hearing on such permit or approval, then the appeal shall be filed within ten (10) days after payment of the fees objected to. The appeal shall set forth in detail the factual and legal basis for the claim of waiver, reduction, or adjustment. The city council shall consider the appeal at the public hearing on the permit application or at a separate hearing within sixty (60) days after the filing of the appeal, whichever is later. The appellant shall bear the burden of presenting substantial evidence to support the appeal including comparable technical information to support appellant's position. No waiver shall be approved by the city council for a new tentative subdivision or parcel map, user permit or similar discretionary approval on property with an approved tentative subdivision or parcel map, use permit or similar discretionary permit unless the council finds that the new tentative subdivision or parcel map, user permit or similar discretionary approval is superior to the approved project both in its design and its mitigation of environmental impacts. The decision of the council shall be final, if a reduction, adjustment, or waiver is granted, any change in use within the project shall invalidate the waiver, adjustment, or reduction of the fee or inclusionary requirement.

Section 4. The City Council hereby finds and determines that adoption of this ordinance is not subject to the review and recommendation of the City of Napa Planning Commission.

Section 5. This Ordinance shall expire on January 5, 2009, unless a later enacted Ordinance enacted before January 5, 2009, deletes or extends this date.

Section 6. If any section, sub,-section, subdivision, paragraph, clause or phrase in this ordinance or any part thereof, is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining sections or portions of this ordinance or any part thereof. The City Council hereby declares that it would have passed each section, sub-section, subdivision, paragraph, sentence, clause or phrase of this ordinance, irrespective of the fact that any one or more sections, sub-sections, subdivisions, paragraphs, sentences, clauses or phrases may be declared invalid or unconstitutional.

MAYOR

/s/ Ed Henderson

ATTEST:

/s/ Pamyla Nigliazzo
City Clerk

STATE OF CALIFORNIA)
COUNTY OF NAPA) SS:
CITY OF NAPA)

I, Pamyla Nigliazzo, City Clerk of the City of Napa, do hereby certify that the foregoing urgency ordinance had its reading on July 6, 1999, and was passed by the following vote:

AYES: Sercu, Techel, Busenbark, Martin and Henderson

NOES: None

ABSENT: None

I, Pamyla Nigliazzo, City Clerk of the City of Napa, do hereby certify that the foregoing ordinance had its second reading on July 20, 1999, and was passed by the following vote:

AYES: Sercu, Busenbark, Martin and Henderson

NOES: None

ABSENT: Techel

ATTEST: /s/Pamyla Nigliazzo
CITY CLERK OF THE
CITY OF NAPA

Appendix H–1

RESOLUTION R1999/161

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NAPA, STATE OF CALIFORNIA, SETTING THE HOUSING IMPACT FEE AND HOUSING IN-LIEU FEE FOR DEVELOPMENTS WITHIN THE CITY OF NAPA

WHEREAS, the City Council of the City of Napa has adopted Ordinance O1999/19 creating and establishing the authority for imposing and charging a Housing Impact Fee for all non-residential developments and a Housing In-Lieu Fee for residential developments not required to meet the inclusionary requirements of such Ordinance; and

WHEREAS, the City of Napa and Napa County Jobs-Housing Nexus Study, September 1992 (collectively with any update thereto, the "Nexus Report") studied the impacts of contemplated future development on affordable housing demands and needs in the City of Napa, along with an analysis of the need for new affordable housing required by new development was conducted, and said study set forth the relationship between the new development, the required new affordable housing and the estimated total cost of providing that new affordable housing; and

WHEREAS, the Nexus Study was available for public inspection and review fourteen (14) days prior to this public hearing; and

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Napa finds and determines as follows:

1. The purpose of the Housing Impact Fee on non-residential development is to mitigate the additional demand for more housing for low and very low households created by these non-residential developments attracting new employees to the City who will be low and very low income households and will, therefore, compete with present residents for scarce affordable housing units in the City of Napa;

2. The purpose of the Housing In-Lieu Fee on residential development is to mitigate the additional demand on rising land prices caused by new market rate housing absorbing the very limited supply of available residential land, thus, increasing the price of remaining residential land and the cost of building affordable housing creating a barrier to the City retaining a balanced community, with housing available to low and moderate income households;

3. The Housing Impact and Housing In-Lieu Fees collected pursuant to this resolution shall be used to increase and improve the supply of housing affordable to moderate, low, and very low income households in the City of Napa by constructing, rehabilitating or subsidizing affordable housing in accordance with Ordinance O1999/19.

4. After considering the study and analysis prepared by Keyser Marston Associates Inc. entitled "Nexus Study," and the testimony received at this public hearing, the Council approves said study, and incorporates such herein, and further finds that new non-residential and residential development in the City of Napa will generate additional demand for affordable housing in the City of Napa;

5. There is a need in the City of Napa for additional affordable housing consistent with the City's Housing Element of its General Plan;

6. The facts and evidence presented establish that there is a reasonable relationship between the need for additional affordable housing and the impacts of non-residential and residential development for which the corresponding fees are charged, and there is a reasonable relationship between the fees' uses and the type of development for which the fees are charged, as these reasonable relationships or nexus are in more detail described in the study referred to above;

7. The City of Napa wishes to implement the provisions of Ordinance O1999/19 by establishing the amount of the Housing Impact Fee and the Housing In-lieu Fee imposed therein on developers of non-residential and residential development projects consistent with such ordinance.

NOW, THEREFORE, BE IT FURTHER RESOLVED that:

1. Housing Impact Fee. The Housing Impact Fee shall be charged and paid on a per square foot basis for all new gross floor area, including all additions where floor area is increased, for each non-residential use type identified in the following Table 1:

TABLE 1

HOUSING IMPACT FEE REQUIREMENT

Type of Use	Fee Per Sq. Ft.
Office	$1.00
Hotel	$1.40
Retail	$0.80
Industrial	$0.50
Warehouse (30,000 to 100,000 sq. ft.)*	$0.30
Warehouse (over 100,000 sq. ft.)	$0.20
Wine Production	$0.50

**Warehouses uses of under 30,000 square feet shall be treated as industrial uses.*

2. Housing In-lieu Fee. The Housing In-lieu Fee shall be charged and paid on a percentage basis of the projected Construction Costs of Market Rate Dwelling Units in a

residential development project. The Housing In-lieu Fee schedule shall be:

A. For Market Rate Units for which the projected Construction Costs are less than or equal to $86,700.00, no fee shall be charged.

B. For Market Rate Units for which the projected Construction Costs are greater than $86,700.00 but less than $115,250.00, one percent (1%) of the Construction Costs for such units.

C. For Market Rate Units for which the projected Construction Costs are equal to or greater than $115,250.00, two percent (2%) of the Construction Costs for such units.

3. Deposit of Fees. All revenues raised by payment of the fees above shall be placed in the Housing Impact Fee account or the Housing In-lieu Fee account of the Housing Trust Fund.

4. Annual Adjustment. The rates set herein for the Housing Impact Fee shall be adjusted annually on or about June 1st of each year starting in the year 2000 by the percentage change (%) corresponding to the percentage change (%) in the Construction Price Index for a wood frame good dwelling unit in the City of Napa based on the valuation method used to issue Building Permits by the Building Department in the City. The projected Construction Costs of Market Rate Dwelling Units for the Housing In-lieu Fee shall be adjusted annually on or about June 1st of each year starting in the year 2000 by the percentage change (%) equal to the percentage change (%) in the Department of Housing and Urban Development (HUD) published median income for Napa County for that year.

5. Annual Review. On an annual basis, the City Council shall review these fees; to determine whether the fee amounts are reasonably related to the impacts of non-residential and residential development and whether the provision of additional affordable housing is still needed in the City of Napa.

6. Judicial Action to Challenge this Resolution. Any judicial action or proceeding to attack, review, set aside, void or annul this resolution shall be brought within one hundred twenty (120) days.

I HEREBY CERTIFY that the foregoing Resolution was duly and regularly adopted by the City Council of the City of Napa at a regular meeting of said City Council on the 6th day of July, 1999, by the following roll call vote:

AYES: Sercu, Techel, Busenbark, Martin and Henderson

NOES: None

ABSENT: None

ATTEST: /s/ Pamyla Negliazzo
CITY CLERK OF THE CITY OF NAPA

Chapter 17.84

AFFORDABLE HOUSING*

Sections:

17.84.010 Purpose.
17.84.020 Applicability.
17.84.030 Requirements.
17.84.040 Implementation and procedures.
17.84.050 Relationship to Council Policy Resolution No. 8.

** EDITOR'S NOTE: Ordinance No. 096-006, adopted 4/2/96, amended this Code by repealing Chapter 17.84 and adding a new Chapter 17.84 (Sections 17.84.010 through and including 17.84.050). Said former Sections were derived from 17.84.010 Purpose.*

Section 17.84.010 Purpose.

The purpose of this chapter is to satisfy the requirements of Government Code Section 65915 by specifying the methods and procedures by which the City of Napa shall provide density bonuses and other incentives for the construction of certain housing projects which are affordable to lower income, very low income and/or senior households and/or residents, as specified under this chapter and Government Code Section 65915. (Prior code § 30-500)

(Ord. No. O96-006, Rep&ReEn, 04/02/96)

Section 17.84.020 Applicability.

A. The requirements and provisions of this chapter for the granting of incentives to developers of affordable/lower income housing shall apply to the construction of five or more units of housing which satisfies one or more of the following criteria:

1. At least 20% of the total units are designated for lower income households;

2. At least 10% of the total units are designated for very low income households; or

3. At least 50% of the total units are designated for senior citizens.

(Ord. No. O96-006, Enacted, 04/02/96)

Section 17.84.030 Requirements.

A. In addition to satisfying one or more of the criteria for applicability set forth in Section 17.84.020 above, the developer and/or applicant for a housing project for which a density bonus, waiver/modification of development or zoning standards or other incentives or concession is requested shall satisfy the following requirements:

1. The designated units shall be comparable in floor plan, furnishings, materials, construction quality size and exterior design to the non-designated units within the project. Designated units may, at the City's discretion, either be dispersed reasonably throughout the project, or, alternatively, located at specified locations on or off-site. Units allowed under a density bonus pursuant to this chapter may, in the City's discretion, be approved and located off-site.

2. The developer shall enter into an agreement with the City and shall execute any and all documents deemed necessary by the City to ensure the continuing affordability of units designated for lower and very low income households. Where the developer requests, in addition to a density bonus, additional incentives and/or concessions, such agreement shall be for a term of thirty (30) years; provided, however, that such term may exceed thirty (30) years if the City determines that a longer term is required by the construction or mortgage assistance program, mortgage insurance program or rental subsidy program. The term of such agreement shall be ten (10) years where the developer requests only a density bonus.

3. Units designated for rent by lower income households shall be affordable at rents that do not exceed thirty percent (30%) of sixty percent (60%) of area median income. Units designated for rent by very low income households shall be affordable at rents that do not exceed thirty percent (30%) of fifty percent (50%) of the area median income.

4. Units designated for purchase by lower income households shall be affordable according to limits established by the State Department of Housing and Community Development.

5. The developer and/or property owner shall provide the City with a yearly accounting satisfactory to the City of the total units occupied, the total units vacant, the total units occupied by lower or very low income households and the total by which the units set aside fell short of the required number of units.

(Ord. No. 096-006, Enacted, 04/02/96)

Section 17.84.040 Implementation and procedures.

A. To apply for a density bonus or other incentive under this chapter, the developer may submit to the City a written preliminary proposal for the project prior to the submittal of any formal application or request for a general plan amendment, zoning amendment, subdivision map approval or other permit or entitlement. The preliminary proposal shall include and provide information describing and specifying the number, type, location and size of the housing units. The written preliminary proposal also shall include and provide sufficient information to enable the City to determine the project cost per unit of the proposed development, and shall include, without limitation, capital costs, equity investment, debt service, projected revenues, operating expenses and any other information requested by the City in light of the specific proposal at hand. The preliminary proposal shall contain sufficient information to enable the City to determine whether

the waiver or modification of otherwise applicable zoning and development standards is necessary to make the housing units economically feasible.

B. Alternatively, if the developer determines not to submit a preliminary proposal, the developer shall submit a written proposal satisfying each requirement set forth above for preliminary written proposals at the time the developer submits any request or application for a general plan amendment, zoning amendment, subdivision map approval or other permit or entitlement.

C. The City may, in its discretion, waive or reduce the information required pursuant to this section when the developer requests only a density bonus and does not seek any additional incentives, concessions or waivers or modifications of development or zoning standards.

D. Prior to the issuance of any building permit, the developer shall pay any fee(s), as established by resolution of the City Council and/or Housing Authority, in order to enable the City to implement the provisions and requirements of this chapter, including but not limited to fees to: (1) process the request for density bonus, incentives/concession and/or waiver/modification of zoning and/or development standards; (2) prepare contracts and other documents; and (3) monitor contracts and documents for compliance.

E. Within ninety (90) days of receipt of a written preliminary proposal or a written proposal submitted along with a request or application for a general plan amendment, zoning amendment, subdivision map approval or other permit or entitlement under this chapter, the City shall notify the developer in writing of the procedures and manner by which it will provide any density bonus and/or other incentive required by this chapter. Specifically, the City's notification to the developer shall specify whether and in what manner the City shall:

1. Grant a density bonus; and

2. Grant additional concessions or incentives, or, alternatively, find that additional concessions or incentives are not necessary for affordability; or

3. Provide other incentives of equal financial value.

F. The notification provided to the developer by the City pursuant to this chapter shall represent the joint recommendation of those city departments charged with the implementation of this chapter, including Planning, Housing, Community Resources, Economic Development and Public Works. Such notification shall not bind, but rather shall be subject to the discretion of, the City Council, in acting on the project, to modify the recommendation.

G. The City Council shall consider and shall act upon the request for density bonus and/or other incentives/concessions at the time it reviews and acts upon the underlying request and/or application. The City Council shall consider, but shall not be bound by, the recommendation and written response previously provided to the developer by City staff pursuant to this chapter, but instead shall make the final decision, consistent with the procedures set forth under this chapter and this title, in granting any density bonus and/or other incentive/concession.

H. Affordable units under this chapter shall be constructed at the same time as market-rate units. The right to a density bonus or concession under this chapter shall not be transferred to another development or exercised subsequent to the development which is the subject of the application for which the density bonus or concession is sought. Nothing in this section shall prohibit, in the discretion of the Council, a developer who proposes to simultaneously develop two or more parcels located within the City from using a density bonus or

concession obtained under this chapter for one of the parcels on another of the multiple parcels.

(Ord. No. O96-006, Enacted, 04/02/96)

Section 17.84.050 Relationship to Council Policy Resolution No. 8.

The provisions of City Council Policy Resolution No. 8 shall set forth the City's standards for granting density bonuses for projects proposed in RH zones which are designated to be affordable for low income senior citizens.

(Ord. No. 096-006, Enacted, 04/02/96)